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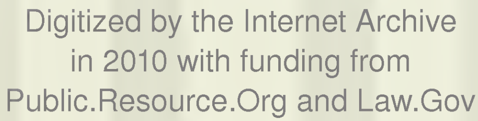
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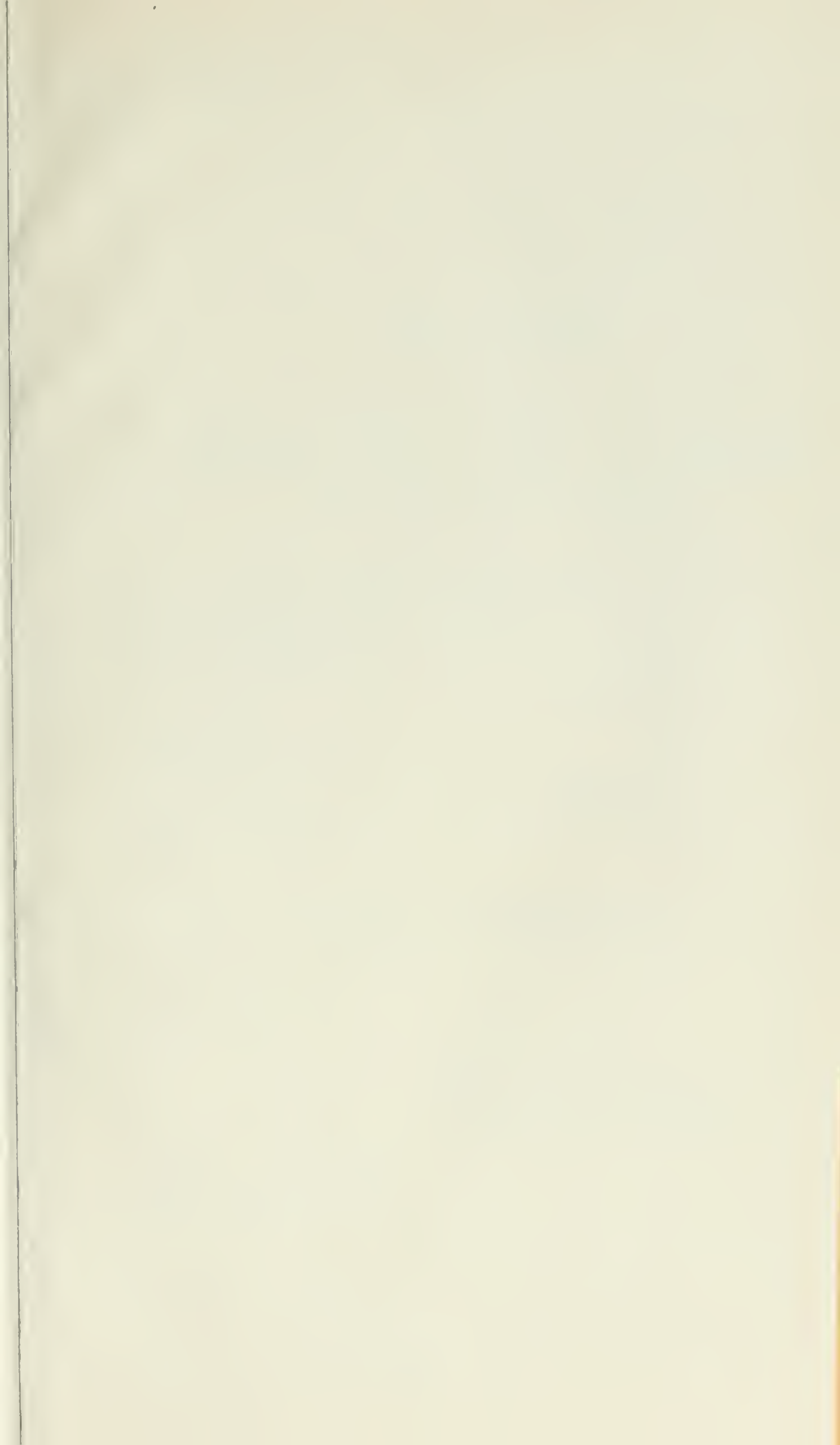


N. 2820

No. 13,658

IN THE

United States Court of Appeals

For the Ninth Circuit

see vol. 2819

MILTON H. OLENDER,
Appellant,

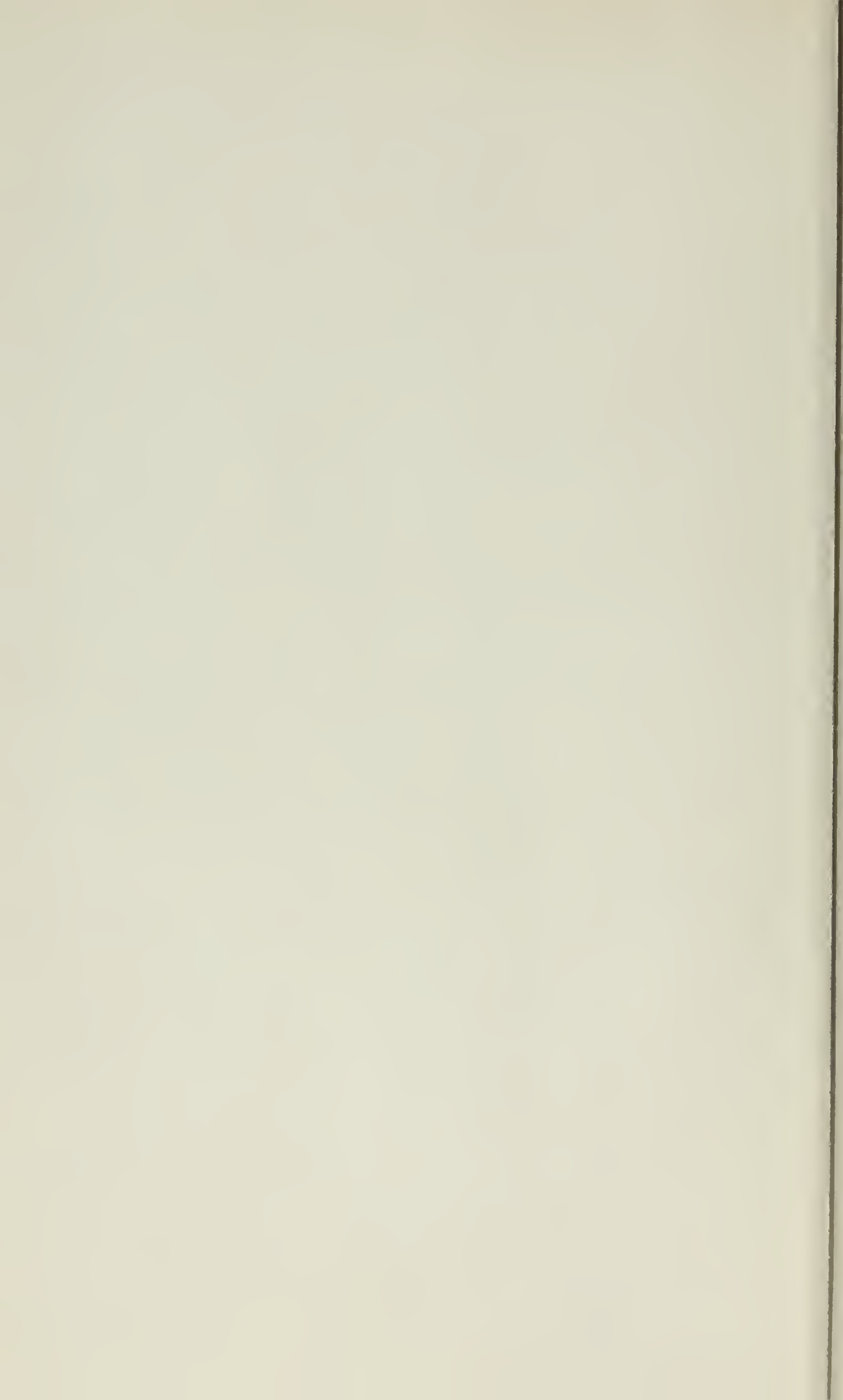
vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

LEO R. FRIEDMAN,
935 Russ Building, San Francisco 4, California,
Attorney for Appellant.

FILED
JUL 17 1953
PAUL P. O'BRIEN,
CLERK



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No. 13,658

IN THE

United States Court of Appeals
For the Ninth Circuit

MILTON H. OLENDER, *Appellant,*	
vs.	
UNITED STATES OF AMERICA, *Appellee.*	

APPELLANT'S OPENING BRIEF.

Appellant was tried and convicted on four counts of an indictment, each count charging a violation of Title 18 U.S.C. Sec. 145b, attempt to evade the payment of income taxes. (R. 3-6.)

Count 1. Charged the filing of a false and fraudulent personal income tax return for the calendar year of 1945. (R. 3.)

Count 2. Charged the filing of a false and fraudulent income tax return for the calendar year 1945 for his wife Bessie B. Olender. (R. 4.)

Count 3. Charged the filing of a false and fraudulent personal income tax return for the calendar year 1946. (R. 5.)

Count 4. Charged the filing of a false and fraudulent income tax return for the calendar year 1946 for his wife Bessie B. Olender. (R. 5.)

The Court sentenced appellant to imprisonment for a period of 3 years to pay a fine of $20,000 and costs. (R. 55-6.)

From the foregoing judgments and sentences appellant prosecutes this appeal.

JURISDICTIONAL STATEMENTS.

1. *Jurisdiction of the District Court.* 18 U.S.C. Sec. 3231 provides that "The district courts of the United States shall have original jurisdiction * * * of all offenses against the laws of the United States."

2. *Jurisdiction of this Court upon appeal to review the judgment.* 28 U.S.C. Sec. 1291 provides that the Court of Appeals shall have jurisdiction on appeals from all final decisions of the District Courts of the United States, except where a direct review may be had in the Supreme Court.

28 U.S.C. Sec. 1294 provides in part that appeals from reviewable decisions of the District Courts shall be taken to the Court of Appeals for the circuit embracing the district.

3. *The pleadings necessary to show the existence of jurisdiction* are the indictment (R. 3) and the pleas of not guilty. (R. 7.)

4. *Facts disclosing the basis upon which it is contended that the District Court had jurisdiction and this Court has jurisdiction to review the judgments in question.* These facts are set forth in the introductory sentences to this brief and will be stated more fully in the following abstract of the case.

STATEMENT OF THE CASE PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

1. General nature of the case, the theory on which it was tried, and the main issues involved.

The indictment charged the appellant in four counts with the filing of false and fraudulent income tax returns for himself and his wife, computed on a community property basis, for the calendar years 1945 and 1946. Counts one and two refer to the year 1945 while counts three and four refer to the year 1946.

The Government attempted to prove the foregoing charges by relying on the "net worth method" of proof. In order to do so the Government had to establish to a fair degree of certainty, appellant's net worth as of December 31, 1944 and December 31, 1945. It also had to establish to such degree of certainty, appellant's net worth as of December 31, 1947. A failure of proof in any of these regards would render all computations by the Government erroneous to such an extent as to constitute a failure of proof of the charges contained in the indictment. (*United States v. Fenwick* (7 Cir.), 177 Fed. (2d)

488, 491; *Brodella v. United States* (6 Cir.), 184 Fed. (2d) 823.)

In support of the charge the Government introduced through the testimony of Charles R. Ringo, an attorney and accountant, a comparative net worth statement of appellant covering the years 1941 and 1947. The document was admitted as United States Exhibit No. 24 and is set forth in the appendix hereto at page 19.

The Government also introduced in evidence a computation of what it considered to be the net worth of appellant at the end of the periods in question. This was admitted as United States Exhibit No. 25 and is set forth in the appendix hereto at page 20.

Appellant countered by introducing in evidence the computation on which he relied as showing his net worth. This document was admitted as Defendant's Exhibit "AK" and is set forth in the appendix hereto at page 28.

Appellant also introduced (Defendant's Exhibit AL) 2 schedules constituting an analysis of the Goodman transaction and the Saraga transaction. This exhibit is set forth in the appendix at page 33.

The parties entered into a written stipulation (U.S. Exhibit 15) as to the assets and liabilities of appellant and his wife at the close of the years 1944, 1945 and 1946. This stipulation is set forth in the appendix at page 36.

The main issues involved in the case were whether appellant had $50,000 or $72,000 plus in his safe deposit box

as of December 31, 1944; whether $20,000 of the bonds found in the safe deposit box belonged to appellant or to appellant's mother; whether appellant had $20,550 of sailor suits on hand at the beginning of the net worth period (this matter is referred to throughout the trial as the Goodman transaction).

It was on the foregoing propositions that the theory of the Government's case was based. This is made manifest from the prosecutor's closing argument to the jury where he states (R. 1357) as follows:

> "What are the three big issues in this case?
>
> 1, shall you credit the defendant with $72,000 rather than $50,000 in his beginning net worth?
>
> 2, shall you credit him with $20,550 as the value of the Goodman suits on hand in the beginning net worth?
>
> 3, who owned the $20,000 in bonds?
>
> Those are the three big issues."

In addition to the foregoing and as minor issues in the case were the following:

1. Whether or not his statement of accounts payable should be reduced by the sum of $6,903.02 due to the fact that such accounts had been paid and the payment not stated on his books.

2. Whether stock in the Asturias Corp. should be included in his net worth at the value of $5,000.

2. Government's case in chief.

The Government first introduced in evidence, through a Deputy Collector of Internal Revenue, the following documents:

Income tax returns of Milton Olender and his wife for the years 1945 and 1946 (U.S. Exhibits 1, 2, 3, 4; R. 70.)

Returns of Milton Olender for the years 1942 and 1943; the return of Mrs. Olender for 1943 and the returns of Mr. and Mrs. Olender for 1944. (U.S. Exhibits 5 to 10 inclusive; R. 72.)

Returns of Milton Olender for 1947 and 1948. (U.S. Exhibits 11 and 12 for identification; R. 73.)

Partnership returns of Olender, Hamilton, Kaplan and Gambor for 1945. (U.S. Exhibit 13 for identification; R. 73.)

Partnership return of Olender, Gambor, etc. for 1946. (U.S. Exhibit 20 for identification; R. 108.)

Return of the Army-Navy Store (Olender's) for 1942. (U.S. Exhibit 6; R. 108, 110.)

Certificates of assessments and payments of Milton and Betty Olender for the years 1942 through 1947. (U.S. Exhibits 21, 22, 23; R. 111, 112.)

GEORGE HORNE, called as a witness for the Government:

I am a certified public accountant. In the year 1946, I was employed by a corporation known as the Asturias Import and Export Corporation, and in connection with my employment by that corporation I maintained the books. In July, 1946 there was an entry of $5,000 for a

purchase of stock by Milton Olender. (R. 75.) The books reflect a subsequent receipt of the same amount from Milton Olender. On December 13, 1946, there was a receipt for $5,000. That was credited to a notes payable account. Later on that amount was transferred to capital stock amount (*sic*) for the capital stock concern in the name of Milton Olender. The book entry date was in January, 1948. (R. 76.) I do not believe that was the date on which that stock was issued to Mr. Olender. I believe the stock was issued prior to that time. I do not know the date. The shares purchased by Mr. Olender July 1, 1946, remained outstanding as of the end of that year, December 31, 1946. The entry, July 1, 1946, shows that 500 shares were purchased by Mr. Olender. The books do not show the number of shares issued. Just the transfer from the notes payable account to the stock account. I have testified with respect to the entry on December 13, 1946, that the corresponding credit was made to the account notes payable. I believe that transaction was intended for a capital contribution by Mr. Olender. (R. 76.)

(The book was admitted in evidence as U. S. Exhibit No. 14.)

(*Cross-examination.*) The transfer from the notes payable account to the stock transfer account was made January, 1948. I was employed throughout that time by the corporation. (R. 78.) I did not make an audit of the books to find the value of that stock as of December 21, 1947. The second payment of $5,000, December 13, 1946, was intended to be a capital contribution. From an accounting standpoint that is the only way you could handle it until

such time as the stock was actually issued or permit granted for the issuance of stock. It was intended to be be a capital contribution. I know that from the conversations at the time it was made. There is a period there when the contribution is made and application is made to the corporation commissioner for a permit to issue stock. Until such time as the stock is actually issued I believe the stockholder could withdraw the amount as contributed. After the stock is issued he would not be able to withdraw it. I cannot answer the question whether the corporation was ever in a position to pay him back the amount. (R. 78-9.) In the affidavit now shown to me which is dated the 5th day of October, 1951, I state:

> "As of December 31, 1947 corporation was, in my opinion, hopelessly insolvent. No action was taken by the interested parties—stockholders, creditors or management—to procure the dissolution of the corporation or put it in bankruptcy because of the apparent futility of any action which might have been taken. In my opinion, any interest held in the corporation whether evidenced by capital stock, note or creditor's claim was totally worthless as of December 31, 1947." (R. 82.)

It is my opinion that statement is true. I have used another surname than Horne. It was Horenstein.

BENJAMIN H. NEIDEN, called by the government, testified:

I am a manufacturer's representative, women's apparel. During its active existence I was associated with the Asturias Corporation. I was vice president, general man-

ager, and treasurer of the corporation. I have brought with me the stock records book of that corporation.[1] (R. 90.)

(*Cross-examination.*) I have no way of telling the date when Mr. Olender received the stock. I would say that I am familiar with the financial affairs of the corporation. (R. 96.) We had ceased operations in July 31, 1947. At that time this company was definitely in financial jeopardy. It was felt, apparently, by the Board of Directors that the organization could not proceed further, and was either insolvent or additional capital had to be added. The corporation did not continue active functions after July 31, 1947.

CHARLES R. RINGO,[2] called by the government, testified:

I am a certified public accountant, associated with D. A. Sargent & Company, certified public accountants. I am also an attorney at law admitted to practice in the State of California. (R. 113.) Mr. Sargent is not an attorney at law. (R. 113.) Mr. Olender came to the firm and saw me up there in the early part of 1948. (R. 114.) I asked Mr. Olender to submit to me figures of estimates of his net worth, and then I went over his affairs with him. I will say that all the figures submitted are purely Mr. Olender's

---

[1]Board Minutes of Asturias Corp. of April 23, 1947 read into record and marked U.S. Exhibit 17; R. 92.

[2]When the witness Ringo was called by the Government, appellant repeatedly objected to any testimony being elicited from him on the grounds the relationship of attorney and client existed between the witness and appellant. This was overruled by the Court. The full substance of this matter is set forth in Specification of Error No. 6.

figures. There was no chance of auditing here because of the nature of the transaction. (R. 117.)

Mr. Olender hired me to look into his tax problems. (R. 118.) I believe the period I covered in my work was 1942 through 1947. (R. 119.) I first asked Mr. Olender to bring me in, to the best of his recollection, the statements of his net worth at the end of each year, showing his figures as he thought they were. Then I got hold of his bank statements and by talking to him and asking him questions I tried to rearrange these figures so as to get the correct figures for the time because necessarily on an individual that way it would be absolutely impossible for the individual to come right out now and say this is it. I was trying to reconstruct. I asked the defendant to bring his net worth figures for each year in order to reconcile his income with his net worth. (R. 120.) I did not make an audit of his books and records. In a great many of these transactions they were purely cash transactions by use of currency and it would be impossible to verify figures. (R. 121.) He had the Army-Navy Store and there were also a lot of investments and items of that nature which did not appear on the books and records which would be common with most individuals. I did not audit the books and records of the Army-Navy Store because I wasn't engaged to do that. (R. 121.) The books and records of the Army-Navy Store seemed to be in pretty good condition. (R. 122.)

I had conversations with Mr. Olender concerning a transaction between the Army-Navy Store and one George Goodman. (R. 123.) Those discussions took place in my

office. (R. 123.) I think Mr. Root gave me a list of cashier's checks at the time that they were used to purchase these goods from Goodman. I asked Mr. Olender if he bought these goods from Goodman and what was done with the goods, and we were never really able to get the whole story of it. The Goodman transactions weren't entered into the books, as far as we could find. (R. 124.) We used the net worth approach because I was asked to get a net worth statement by the revenue agent. (R. 125.) I determined that the books and accounts of the Army-Navy Store were not complete as far as the Goodman transaction. It never went through the books of the Army-Navy store, either the acquisition or the disposition of it. (R. 125.) The document which is now before me which is entitled "Milton H. Olender Comparative Worth Statement of December 31, 1947 and December 31, 1941" is my attempt to work out the net worth of Mr. Olender at a beginning and an ending period, and I have tried to reconcile that to his income tax returns and tie them together. The document marked "Exhibit 1" which is in front is the summation of the net worth at the beginning and end of those two periods as best I could determine. (R. 127.) The similar documents now shown me bear in the upper right hand corner Exhibit 2, Exhibit 3, pages 1 and 2, Exhibit 4, Exhibit 5, Exhibit 6, Exhibit 7 and Exhibit 7-Schedule A, are the details of what appears in Exhibit 1, and the last exhibit, Exhibit 7, is the accounting for the increase in net worth. I first asked Mr. Olender to give me an estimate statement of his net worth at various dates. Then I went through his safe deposit box to find out what was in the safe deposit box and then I tried to

trace back how he acquired these various assets he had and through discussions with Mr. Olender and asking questions, so if there were things not included in the safe deposit box that should be included, I tried to get the information from which I could work up these net worth statements. (R. 128.) I saw the items in his safe deposit box and asked him how he acquired them. I saw cancelled checks for various items. I did get his bank statements, which were incomplete, and a period I couldn't get. I got transcripts from the bank, picked out the larger items of expenditures on there to see if they would account for more assets and asked him to get me more information so as to work it out. There was no way of knowing just what he spent for living, because I don't know just what he did spend. They are purely figures that were given to me by Mr. Olender. (R. 129.)[3]

I had a conversation with the defendant with respect to an item included in Government Exhibit number 24 under assets as of December 31, 1947 entitled "single premium life insurance policy $15,833.46". The conversation took place in my office during a period when we were working on his net worth. (R. 130.) Mr. Olender brought this data in to me just after I worked up the preliminary net worth, and he brought this item to me and told me that he had something that he had forgotten to include. I said at the time it would throw his net worth out of balance. He asked me if I would leave out the Asturias stock, because it was worthless, because he didn't want to involve his mother in connection with certain gifts she had

[3]The document marked "Exhibit 1", admitted as U.S. Exhibit 24 (R. 129) and is set forth in the appendix.

made to him. His mother was getting old and he didn't want to have her explain. (R. 131.) That request was made to me after I called the defendant's attention to the fact that the $15,000 single premium life insurance policy had been left off the net worth statement, and therefore it would be out of balance to that extent. (R. 131.) I went to Monroe Friedman and he insisted it would have to go in. He would have to give the explanation. (R. 132.) We discussed the item of the single premium life insurance policy with Mr. Friedman in the presence of Mr. Olender. We told him nothing could be left out and we would have to get the gifts from his mother. I believe a list of securities owned by him was not in his safe deposit box but we did get that from the cancelled checks. I asked him to produce cancelled checks. (R. 132.) The defendant's ownership of Asturias stock was included in my net worth statement as shown in the defendant's Exhibit number 24. The value of that stock as shown on the net worth statement is $5,000. The defendant, Olender, did not tell me that he had purchased an additional $5,000 worth of Asturias stock. (R. 133.) The photostatic copy of a document now shown me bearing the title "M. Olender Comparative Balance Sheets, 1941-1946" is a summary of the items he brought to me, the various statements he brought to me of his net worth. I had asked him to bring me estimates of his assets and liabilities. That is in my handwriting. Mr. Olender took back the originals and the information which appears on this document I got from Mr. Olender. (R. 134.)

(The photostat copy referred to was received in evidence as United States Exhibit number 26.)

(Counsel for the government read the first item of the exhibit "Cash in Vault" and stated that, as of the 31st of December, 1944, the figure was shown as $50,000.)

I examined the contents of the taxpayer's safe deposit box in the Bank of America, 12th and Broadway in Oakland on Wednesday, May 5, 1948, about 10 A.M. I have my contents right here.

(*Cross-examination.*) I prepared this comparative net worth statement for Mr. Olender by questioning him orally about his affairs. I made no audit of his affairs. No audit of his books. (R. 137.) I did not attempt to fit this comparative net worth or analysis of his accounts and affairs into any particular year. I started out with that idea, but I did not finally do it. I made an inventory on May 5, 1948 of the contents of the safe deposit box and I prepared a memorandum right there at the safe deposit box as I was going through these things. (R. 137.) I have a memorandum here "bonds held for mother, 2¼% Treasury Bonds" listed as $20,000 worth. I was there with Mr. Olender. (R. 138.) I understood he was taking the Goodman transaction up with Mr. Friedman as to how he disposed of the stock. He explained to me that he made a purchase of about $20,000 worth of stock from a man by the name of Goodman. The goods were delivered to him and they were not proper for his store, and he was able to dispose of most of them at cost—about 75% of them at cost in various transactions, and that he made no profit or loss on the deal and he did not, as a result, put them into the books of the Army-Navy Store. (R. 139.) I got that I think from Mr. Root at the time

that he brought me the data, and I talked it over with Olender on the cashier's checks. (R. 139.)

I made up a comparative net worth statement because the government asked for it. In making up that net worth statement from the information received from Mr. Olender, he did not tell me about any additional Asturias stock. After I had discussed it with the agents and they asked about that item, I went back to discuss it with Mr. Olender. He told me that in his mind there was no point of putting any worthless stock in a net worth statement. In fact, at the time he asked me to leave it out and he said the stock was worthless anyway and it should not be in net worth. He told me he lost all the money he put in and that the company was hopelessly insolvent. (R. 141.) Mr. Olender failed to tell me at the same time of a bank account of his wife, and subsequently in conversation with the agents, Mr. Root and Mr. Whiteside, they asked me in the comparative net worth statement where that account was shown. They told me it was not included. (R. 143.) After I took up these two problems with Mr. Olender that is, as to why he had omitted the item of the Asturias stock and why he had omitted the item of his wife's bank account and her furs, he told me that in his idea as an accounting for whatever net worth statements were supposed to be made, it didn't belong there. I prepared this net worth statement by questioning him as to his assets. I questioned him as to his bank accounts and he gave me the names and locations of two or three of his accounts. I don't know where his wife's bank account was. (R. 146.) I believe Mr. Olender had

a girl keeping the books, and I believe they were not in his handwriting. (R. 147.) Mr. Olender told me that his parents had been quite wealthy and he had inherited a lot of money. The books of the Army-Navy Store did not reveal any of the personal investments and other affairs of the defendant. You very seldom find anybody including their personal investments in their business books. (R. 148.)

This comparative net worth study that I prepared wasn't intended to be a full and final and complete study by any means. That was just a starting point for the other study I prepared. (R. 149.) If I had tried to break this down into a period of years it would have shown that the defendant had over-reported income as well as under-reported income. (R. 150.)

(*Redirect.*) I say here is the list of bonds of what was in the safe deposit box and on the second page I have down here bonds being held for mother and they are 2¼% Treasury bonds, and there is a total of $20,000 worth. That the entry is right here (indicating). (R. 150.) He told me those bonds belonged to his mother, and I believe it was also identified in the box that they were his mother's. (R. 151.) The yellow paper now shown me, containing a number of figures, entitled at the top "M. Olender shares" and the word expense, is the figures that Mr. Olender gave me in order to prepare his 1947 income tax return. That is in his handwriting, except you will see where it says "interest" I have inserted in my own handwriting "U. S. Government Bonds $1225". (R. 151-2.) Another document now shown me, consisting of two pages

which says at the top "Income taxes, depreciation, Olender, Hamilton, Kaplan Fresno Partnership" is the data which Mr. Olender gave me for preparation of his 1948 income tax return.

(The said documents were marked United States Exhibits 27 and 28 for identification.)

The figure shown for interest for the year 1947 in Exhibit number 27 is $1225. The similar figure for the year 1948 is $775. (R. 163.)

TRUMAN H. HARLEY, JR., called by the Government, testified:

In 1946 I was employed by the Bank of America, Oakland Main Office; the three documents you show me entitled "Form TCR-1 Report of currency transactions" dated January 10, 1946, March 26, 1946 and September 20, 1946, are merely reports of large sums of cash given to the tellers in the bank either for deposit or for the issuance of cashier's checks. (R. 179.)[4]

I had a conversation with Mr. Olender relative to the Treasury forms I have identified; (R. 182.) Mr. Olender stated that some member of the Government had asked him about those reports submitted from the bank and he seemed indignant or annoyed that we should have reported it; he said that money was used to buy bonds or cashier's checks (R. 183).

Here the prosecutor read from the forms as follows: Exhibit 30 shows the Army and Navy Store, December 5,

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[4]The 3 TCR reports marked U.S. Exhibits 30, 31, 32. A similar report dated June 18, 1946, marked U.S. Exhibit 33.

1946, $10,000 and $15,000; "issued cashiers' checks for amounts paid with entire cash. Purpose to buy bonds."

Exhibit 31 shows M. Olender (2 transactions), first, November 9, 1945, amount $25,000—250 $100 bills, cashed check for $25,000. The second, November 20, 1945, $25,000 —250 $100 bills, deposited commercial account.

Exhibit 32. Milton H. Olender, September 19, 1946. Two entries. $1000 in one hundred dollar bills and $1500 in $20 bills, deposited by defendant.

Exhibit 33. M. H. Olender, May 29, 1946, purchase of cashier's check for $3000 paid for with 3 one thousand dollar bills. (R. 185-7.)

LENUS CARDOZA, called by the Government, testified:

I am employed by the American Trust Co.; I have produced 2 cashier's checks and the register covering those checks. (R. 187.)

I have no personal knowledge of the endorsements that appear on those checks. (R. 188.)[5]

LOUIS LEAVY, called by the Government, testified:

I am a dealer in military supplies at 1026 Mission Street, San Francisco. I know Milton Olender. I have had busines dealings with him over a period of about 10 years and still have business dealings with him. In May of 1945 I sold sailor suits to one Lerman. (R. 190.) I was acting for Mr. Olender in connection with that sale. He was the owner of the suits.

---

[5]The two cashier's checks #7115 and #7116 and 2 register sheets admitted as U.S. Exhibits 34, 35, 36 and 37.

(Thereupon two invoices were introduced in evidence as United States Exhibits 38 and 39 respectively (R. 191).)

Two cashier's checks drawn on the American Trust Company, each in the amount of $2500 and marked "U. S. Exhibits 34 and 35", were tendered to me by Mr. Lerman in payment of the two sales to which I have just testified. I turned these two checks over to Mr. Olender after I endorsed them. (R. 191.)

In the closing months of 1945 and early 1946 I had occasion to make other sales of sailor suits for Mr. Olender. I sold between 250 and 300 or 320. I don't remember exactly (R. 192.) In the closing months of 1945 I went to New York on my own business. On that trip I attempted to purchase sailor suits for Mr. Olender, and I took with me funds belonging to Mr. Olender for that purpose. My recollection is I took between $6000 and $7000. I don't remember whether it was in the form of cash, checks or otherwise. (R. 192.) The $6000 or $7000 came from those sales to which I have testified, and I took that money with me to New York at the instructions of Mr. Olender to buy small sizes of sailor suits. It was his money. It had come into my possession as a result of the sales of his suits, which I had made for him. (R. 193.) None of the transactions in which I engaged on behalf of Mr. Olender appeared in my books for the reason that I was not in that business. I just acted as an agent in buying those suits for Mr. Olender. I turned that money over to Mr. Saraga who was in the business of handling military supplies and he had some sailor suits at the time or was having them made, and I turned the

money over to him for the purpose of purchasing sailor suits from him. (R. 194.)

(*Cross-Examination.*) I have known Mr. Olender since about '42; I have only known him through business that he has done with me. I was going to make those purchases of sailor suits on his behalf in New York because he was a very good account of mine and I tried to help him. They were very difficult to obtain. About 1943 Mr. Olender asked me time and time again whether I could obtain some sailor suits for him. (R. 195.) I said, "The next time I go to New York I will try to obtain some for you." So when I went to New York, I believe it was in 1944, I made some arrangements with a concern, George Goodman, by which I purchased about $20,000 worth of sailor suits for him. (R. 195.) These suits were subsequently delivered to Mr. Olender in Oakland. When Mr. Olender got these suits several weeks later he complained to me that the sizes were not what he bought. The sizes that were on the suits as 34 practically was a 38. He said I had to get rid of same as he had no tailor to cut them down. I subsequently disposed of 200 of those suits to Mr. Lerman who operates a store right opposite Mr. Olender and who had a tailor to cut them down. I never told him who they came from because I don't believe Mr. Lerman would have bought them and I don't believe Mr. Olender would have sold them to Mr. Lerman on account of competitors. (R. 196.)

MOE SARAGA, called as a witness on behalf of the Government:

I am a merchant residing at 656 Broadway, New York City. I recall a transaction late in 1945 in which Mr.

Leavy gave me between six and seven thousand dollars for the purpose of buying from me sailor suits on behalf of Mr. Olender. I have brought my books of account in response to a subpoena served upon me. (R. 199.)[6]

On page 34 there appears a receipt of $7000.09, on August 2, 1945 from one Leavy. (R. 205.) On August 6, 1945 appears a receipt of $6500 from the Army and Navy Store. On November 15, 1945, page 127, there appears a disbursement to the Army and Navy Store of $7725. (R. 206.) There was a refund of $6500; there was also a refund of 29 uniforms at $25 each because we couldn't deliver the goods. The difference between 7725 and 6500 was a refund of an overpayment. On March 19, 1946 there is a receipt of $7724 from Lewis Leavy. (R. 207.) There is a disbursement shown for June 24 '46 in the amount of $7724 to Lewis Leavy. (R. 208.)[7]

(*Cross-Examination.*) I dealt entirely with Mr. Levy. I did not know Mr. Olender at all during these transactions. As to whether I would have sold directly to Mr. Olender, we were not in a position to sell any goods at the time. There was a shortage at the time. Mr. Levy was a large customer of mine. (R. 212.)

LEWIS LEAVY, recalled by the Government:

I turned Government Exhibit No. 42, which is a check payable to myself and drawn by Mr. Saraga, over to Mr. Olender. That appears to be his signature. I cannot

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[6]The volumes of Saraga's cash receipts and disbursements marked U.S. Exhibits 40, 40a, 40b. (R. 204.)

[7]Check dated Nov. 15, 1945 for $7725 payable to Army & Navy Store and check dated June 24, 1946 for $7724 payable to Louis Levy, marked U.S. Exhibits 41 and 42. (R. 211.)

recall persons to whom I had made sales of Mr. Olender's suits in 1945 beyond the specific sales to Mr. Lerman. I testified that I had sold from 250 to 325 suits. Beyond those I don't remember exactly; it was a small amount (R. 216-7.)

SEITH L. ROOT, called by the Government:

I am an internal revenue agent, United States Treasury Department. I was assigned to this particular case the beginning of its investigation. (R. 218.) Government's Exhibits Nos. 30 through 33, inclusive, and which are now shown to me and which have been identified as reports of unusually large transactions of currency, were given to me in connection with the taxpayer's resturns. (R. 219.) In the course of the investigation, I interviewed Mr. Olender on a number of occasions. I believe I first talked to the defendant on December 29, 1947. On January 12th I met with him at his place of business, 1026 Broadway, Oakland. I was there the good part of several succeeding days. (R. 220-1.) He does not employ a manager. He does the active management of the store himself. He employed a bookkeeper on a part-time basis (R. 221-2); her name is Vera Manger. The defendant said that he would supervise the maintenance of the books and records, that this was not a one-man store but a smaller store, and so that he was in a much more intimate contact with books than would be true in a larger firm. He would furnish the data to the girl for posting, and I think, in fact, some of the posting was done by him. (R. 223.) There was a cash book which reflected the receipts or sales of the business, a check register which reflected the disbursements. I believe

that all the disbursements were eventually accounted for by check, in that any cash disbursements out of the register were reimbursed by checks drawn on the firm. There was a general journal and ledger. Mr. Olender told me that the receipts were compiled from the cash register tapes at the end of the day. That is, cash business. (R. 223.) Mr. Olender took the daily readings from the cash register. I asked Mr. Olender for a comparative net worth statement. (R. 225.) I knew that the defendant's books in the Army-Navy store were not complete because the Goodman transaction was not on the books. (R. 226.) Subsequent to receiving Mr. Olender's net worth statement, I asked for a joint investigation with the special intelligence unit in this matter. From that time on Mr. Whiteside worked with me on the investigation of this case. My report in this matter, as I recall, went in in 1949. I am not certain of the date. I compared the books of the Army-Navy store with the taxpayer's returns for the years 1945 and '46. They were in substantial agreement. (R. 227.) During the course of my investigation I included some earlier years because I thought it was necessary to get the full picture. I went back to January 1, 1942. (R. 228.)

In the examination of the books of the taxpayer's I did not find any errors in the years 1945 and 1946. (R. 229.) The two checks, Government's Exhibits Nos. 34 and 35 each in the amount of $2500, appear on the books of the taxpayer as a credit to his capital account, as a contribution of capital from the taxpayer. (R. 231.)

MELBOURNE C. WHITESIDE, called by the Government:

I am a special agent in the Intelligence Division of the Internal Revenue. (R. 234.) I am a licensed public accountant. My investigation started subsequent to the first day of December 1949. I concluded an investigation of the data which is shown on the Government's Exhibits 24 and 25. (R. 235.) We examined bank accounts, escrow records, grantee-grantor records at the county recorder's office and various other accounts. As a result of my work we found that the taxpayer had omitted $5000 worth of Asturias stock from the net worth statement, and also a savings account of Mrs. Olender's had not been included. Mr. Root had these T.C.R. reports of a cashier's check being purchased by Mr. Olender for cash. The cashier's check was deposited in Mr. Olender's bank account. (R. 236.) Exhibit No. 33 is the exhibit which shows the purchase of cashier's check in the amount of $3000 with $1000 bills, and I traced these cashier's checks into the savings account of Mrs. Olender's in the Bank of America, Main Office, 12th and Broadway, Oakland. The balance in that account at the end of 1946 was $10,000 plus. We located the second investment in the Asturias Company in the records of the company itself, and in verifying that we found that there was an additional $5000 invested beyond the one that was shown in the taxpayer's return. (R. 237.) The omitted investment was the investment of July 17, I believe. We found that the two checks, Government Exhibits Nos. 34 and 35 which were identified by Mr. Leavy as proceeds of the sale to one Lerman on behalf of Mr. Olender were

reflected by those two checks. We found that these checks had been credited to Mr. Olender's capital account as an additional investment. (R. 238.) The check for $7724 drawn by Mr. Saraga which is Government's Exhibit 42 is not recorded on the books of the Army-Navy Store. The check itself was deposited in Mr. Olender's personal bank account. (R. 239.) There was a withdrawal during 1947 in the neighborhood of $6000 plus from Mrs. Olender's account. (R. 240.)

(*Cross-Examination.*) I have stated that $5000 out of the Lerman sale was deposited in the store bank account and credited to the Olender capital account of the books of the store. There is no indication that the $5000 was a part of the $20,500 worth of cashier's checks purchased in January '44 and set forth in that exhibit as the Goodman checks. (R. 242.) We didn't get all the personal checks and commercial account checks for 1945. To the best of my recollection, I believe we got all the store checks. I never made an examination as to the value of the Asturias Import Export Corp. stock. (R. 243.) In the course of my investigation, I talked to Mrs. Widrin, Mr. Olender's sister-in-law. (R. 207.)

(*Redirect Examination.*) I found that the $5000 credit to the capital account consisted of a receipt of a cashier's check at the American Trust Company, and I had determined that cashier's check was purchased at the American Trust Company by Mr. Lerman. Government's Exhibits Nos. 36 and 37 are the two checks of Mr. Lerman's to which I referred. (R. 245.) The cashier's check register shows that those two checks dated in May, 1925 (sic),

drawn by Mr. Lerman was used to purchase the two cashier's checks in evidence.

(The said documents which had heretofore been offered for identification only were now received in evidence as U. S. Exhibits 33 and 34.)

(*Recross Examination.*) I have now secured the file of the Asturias stock from the Securities Division.

Thereupon counsel for the defendant read into the record the following portion of the report of the securities division of the office of Internal Revenue:

"San Francisco, 5, California October 19, 1951. Stock and stockholders' loans are deemed to have become worthless in the year 1947, according to the attached copy of the information report dated November the 28th, 1950, prepared by M. E. Seaback, Internal Revenue Agent." (R. 256.) (Def's Exhibit A.)

The defendant was a member of some partnerships in which some Fresno properties were involved. He sold some sailor suits which were not included in his income tax return. (R. 257.) I did not find any other income that was not reported with the exception of the ones that are in evidence.

(*Further Redirect Examination.*) Mr. Olender was engaged in partnership activity in connection with the operation of the Riverdale Ranch in Fresno. That ranch was sold in 1946 I believe. The sale of that property resulted in capital gain to the partnership. That gain was not reported by the taxpayer in the year 1946. (R. 258.)

The capital gain realized from the sale of the Riverdale Ranch does not appear either on Exhibit 2 or 4 which are the individual's tax returns for the year 1946.

(*Further Recross Examination.*) Government Exhibit No. 20, which is the partnership return of Olender, Hamilton, Kaplan and Gambor, does not show the sale of the Riverdale Ranch. There was a business loss from the operation. (R. 259.) That is under Expense Item on the return. It shows "loss on sale, $84.22." I don't know if that is the sale of the ranch or the sale of some equipment on the ranch. (R. 260.) As I recall, I agreed to the income or the profit as we determined it. What the differences were I don't recall at this time.

HUBERT C. MYTINGER, called on behalf of the Government:

I am technical advisor, office of the Regional Counsel, Penal Division, Bureau of Internal Revenue. (R. 261.) Prior to my present employment, I served as internal revenue agent for approximately 11 years. I am a certified public accountant. (R. 262.) I have heard all of the testimony in this case and have examined all of the exhibits which have been introduced into evidence and have prepared computations of net worth and income. (R. 263.) The evidence relied upon in this particular computation which I made with respect to a very few items is contained in the stipulation, Government Exhibit 15. Those exceptions are the Asturias stock or investments. (R. 268.) Exhibits 14 and 15 are relied upon, and I believe, the testimony of two witnesses at the trial with respect to the cash in the safe deposit box. Government Exhibits 25

and 45 are relied upon coupled with Exhibit 24, the net worth statement of the defendant. Now, as to the expenditures, on the second sheet tabulation as noted here, the nondeductible expenditures, one item appears under each year which appears in this stipulation; two items appear under 1946; namely, I. Magnin and the Gray Shop, which are supported by the evidence and testimony separately. (R. 268.)

Likewise the nontaxable portion of the capital gain appearing on the second sheet is in the stipulation. (R. 269.) I have also included the Asturias items, the cash involved, and then with respect to nondeductible expenditures, the exhibits which have been introduced covering I. Magnin Company and the Gray Shop. (R. 269.) According to my computation the net worth of the defendant and his wife as of December 31, 1944 was $191,002.07; as of December 31, 1945 $260,113.29; as of December 31, 1946 $283,193.62. (R. 270.) The net worth of the defendant and his wife increased $69,111.22 in 1945. In 1946 the net worth increase was $23,080.33. According to my computation the total amount of nondeductible expenditures not included in the net worth computation for the year 1945 was $19,081.32, in 1946 $26,240.37. According to my computation the amount of nontaxable capital gains of the defendant and his wife was $139.77 in 1945 and in 1946 it amounted to $464.47. According to my computation, assuming net worth income is represented by the increase in net worth plus allowable expenditures, less nontaxable income each year, the total net income of the defendant and his wife would be $88,052.77 for 1945. (R. 271.) For

1946 it would be $48,856.23. According to my computation the total amount of net income unreported by the defendant and his wife for 1945 is $46,985.16 and for the year 1946 the sum of $25,341.61. The 1945 returns show that they reported $41,067.61 and for the year 1946 the returns showed a reported $23,514.62. (R. 271.) Assuming that the unreported income to which I have just testified is taxable, one-half to each spouse on his separate returns, and assuming further that income as best corrected includes taxable long term capital gain in 1945 $139.77 and in 1946 $464.47, and assuming further that each spouse is entitled to exemptions as claimed on the returns which were filed by them in 1945 and 1946, the corrected amount of net income for the year 1945 from Milton H. Olender is $44,588.96, and for Mrs. Olender $43,463.81; the corrected taxable liability for the year 1945 from Milton H. Olender is $23,523.67 and for Mrs. Olender for that year $23,058.57; the total tax liability for the year 1945 would be $46,582.24. (R. 272.) The corrected amount of the net income for Milton H. Olender for 1946 is $25,185.62, and for Mrs. Olender $23,670.61. The corrected tax liability for the year 1946 for Mr. Olender $9,171.99 and for Mrs. Olender $8,322.83. The total for the year 1946 $17,494.82. The amount of the unreported tax liability for the year '46 for Milton Olender is $6,117.14 and the unreported tax liability for the year 1946 for Mrs. Olender is $5,814.89. The total unreported tax liability for 1946 is $11,932.03. In 1946 they reported a tax liability of $5,562.79. The reported tax liability for both Mr. and Mrs. Olender in the year 1945 is $15,495.75. The total unreported tax liability for 1945 is $31,086.49. (R. 273.)

(Thereupon counsel for the Government asked the following question of the witness, "Have you examined the returns filed by the defendant and his wife for the years '42, '43 and '44?" To this question counsel for defendant objected upon the ground that there was no foundation for the said question. The Court overruled the said objection and counsel for the defendant took an exception.)

I have examined the said returns. In arriving at this aggregate, I would like to explain one assumption or calculation I had to make on the 1944 return filed by the defendant's wife. (R. 273.) The last sheet of that return, the one on which the deductions would appear, is not attached to the return. There is a schedule attached to the return of the husband's, Exhibit 9 which shows that she was to claim a total deduction of $538.50. I find that by subtracting that amount, $538.50, from the income shown on the face of her return $18,263.81, I arrive at a net income which apparently would be shown on the third sheet of her return of $17,725.36. I further find that by allowing the same exemptions as she claimed on her 1945 return, the next nearest comparable year, I would have the resulting tax liability of $6,329.45 also shown on the first sheet of her return. So I assume that this filing of net income was the $17,725.36 which has been reported on her 1944 return. Using that figure and the net income as otherwise shown on the other returns in evidence for 1942, '43 and '44 there is an aggregate income reported of $89,431.60. (R. 274.) I have examined the assessment certificates which were prepared by the Collector of Internal Revenue and are in evidence as Government's Exhibits 21, 22 and 23. I find a total income tax

was paid during the years 1942, '43 and '44 amounting to $16,871.07.

(*Cross-Examination.*) The $20,000 worth of bonds of which Mr. Ringo made an entry with a notation "Bonds belong to mother" are included in the $82,000 figure that I used. (R. 278.) If the Asturias stocks were worthless it would be allowed as a deduction as a loss on worthless stock. (R. 279.)

I prepared U. S. Exhibit 51. I made no verification of the first item, cash in store register, $2500 in 1944; $1,000 for the next two succeeding years. My answer would be equally applicable to all of these items. I made no independent verification. (R. 1072.)

I never independently verified a single item on the basis of which I based my calculations. (R. 1072.)

3. Case for defendant.

CLIFFORD F. CARROLL, called for the defendant, produced the history card of a safety deposit box of the Oakland branch of the Bank of America which was received in evidence as defendant's Exhibit B and the history card of another box at the same bank, the boxes being designated as Nos. 44 and 56 respectively. The first box standing in the name of Molly or Milton H. Olender and the second in the name of Milton or Betty B. Olender. (R. 303.)

The Witness. There was a change made on April 22, 1945. Title to the box was changed to Milton Olender and Monroe Friedman. I am personally acquainted with Judge Monroe Friedman. I cannot tell from the record

how many times Judge Friedman entered that box. (R. 304.)

(The records for safety deposit box No. 56 were received in evidence and marked Defendant's Exhibit C. (R. 305.))

ELLA WIDRIN, called by the defendant testified:

The defendant is my brother-in-law. At the time of the decease of my mother I had around $575 of my mother's money and I gave it to my brother-in-law to be used for her funeral expenses or any way he saw fit. (R. 306.) That was on August 24, 1945. (R. 309.) The defendant took care of the funeral of my mother.

S. E. REINHARD, called by the defendant:

I am connected with the Main office of the Bank of America, 12th and Broadway, Oakland. I have known the defendant approximately 20 years. I am familiar with his reputation in the community. (R. 311.) His truthfulness, honesty and integrity in the community in which he lives is very good in my opinion. I know the defendant's business. He specializes in men's clothing, working-men's clothing, uniforms, insignias and that sort of thing for army and navy personnel. I have counselled with the defendant in various business transactions. I act as his banker. (R. 311.) In 1948, to the best of my knowledge, he told me he was having some difficulty with the Treasury Department, they were going over his books, and they claimed that there was a tax deficiency or that his income was more than shown on his books. So I suggested that he go to a firm of accountants in our building known as D. A. Sargent Company and that they

would—that they enjoyed a very high class reputation and they could probably work out his problems for him. I also mentioned that one of the partners in the firm was a tax attorney, and I thought it would work very well in his picture. (R. 312.) I knew the man who was the tax attorney. His name was Ringo. Over the years I have made loans to the defendant in connection with his business. I have specifically recommended the transfer of cash balances into Government bonds. (R. 313.)

Thereupon counsel for the defendant read into the record an *affidavit of now judge then attorney Monroe Friedman,* dated September 13, 1948 (R. 323):

"Monroe Friedman, being first duly sworn, deposes and says: That ever since the year 1920 I have been and now am an attorney at law, duly and regularly licensed to practice law before all the courts of the State of California; that ever since the year 1930, I have been and now am duly and regularly licensed to practice before the United States Supreme Court.

"That I have known Milton Olender for over thirty years; that I first knew him when we were both students at the University of California at Berkeley, California; that from 1940 on, I represented him on a few occasions in some legal matters.

"That in the beginning of April, 1944, Olender called at my office and stated that he and his family were planning to go to Texas later in the month to visit his son who was in the United States Army and stationed in Texas; that he wanted me to have access to his safe deposit box during his absence, and to take care of any

matters that might arise in his business during his absence.

"That on April 22, 1944, I met Olender by appointment at the Bank of America, National Trust & Savings Association, 12th Street and Broadway, Oakland, California; that on that day, safe deposit No. 56 in said bank was transferred from the names of Milton Olender and his wife to the names of Milton Olender and Monroe Friedman; that I went in with him to look at the safe deposit box itself; that Olender opened it in my presence; that that were several papers and some bonds in the box, and also over $70,000 in United States currency; that Olender gave me the key to said box.

"That on May 5, 1944, after Olender had returned from Texas I again met him at the same bank by appointment, and the same safe deposit box was transferred back to the names of Mr. and Mrs. Milton Olender; that on that day, Olender opened the said box in my presence, and the contents were the same as on April 22, 1944; that I then returned the key to said box to Olender; that I did not open the said box at any time between April 22, 1944 and May 5, 1944, and that said two occasions were the only times that I ever saw the said box or any contents thereof." (Defendant's Ex. D.)

HIRAM A. LORENZEN, called by the defendant:

I am secretary-treasurer of Money Back Smith Co. It is one of the largest men and boys clothing stores west of Chicago and is located at 12th and Washington Streets in Oakland. (R. 342.) I have known the defendant, Milton Olender, about 25 years and I have on occasion done

business with him. I would say that his reputation in the community for truth, honesty and integrity is the best. (R. 342.) In the year 1944 I had transactions with Mr. Olender in the nature of sales of surplus merchandise or merchandise that we could not sell in our own store, or that we didn't want to sell in our own store because of the type of merchandise. Mr. Olender paid in cash for most of these goods. (R. 343.) In the years 1944, '45 and '46 the size of the lots of goods he bought amounted to four or five hundred dollars. (R. 344.)

The invoices now shown me are for merchandise sold to Mr. Olender on the store of Money Back Smith. (R. 1077.) I am still employed by that firm. We made duplicates of the originals because Mr. Olender either lost them or didn't have them, and that was after our statement was sent to him and he asked us to send him duplicate invoices. These records were made under my direction from my firm's books which were kept in the due course of business and are true and accurate records of what they speak for on their face. (R. 1078.) These duplicates were made out after our statement was sent out and he asked for the duplicate bills. So those that were paid we marked "paid" and those that were not we left open. When we furnished duplicates to Mr. Olender we included the dates of payment which did not show on the originals. (R. 1079.)[8]

MORRIS LERMAN, called by defendant:

In 1945 I was engaged in the so-called military supply business, such as uniforms, hats, caps, shoes and so forth,

[8]The invoices of Money Back Smith marked Defendant's Exhibits AM and AM-1. (R. 1083.)

the need for military personnel. The checks now shown me, Government's Exhibits Nos. 43 and 44, are my checks. (R. 1142.) They were made payable to the American Trust Company for the purpose of securing two cashier's checks in payment for some sailor suits. The checks were originally made out to Mr. Lou Levy, from whom I had arranged for the purchase of the suits. I received two separate checks of $2500 each. (R. 1143.) I paid Mr. Levy for the suits with the cashier's checks. (R. 1144.)

MILTON H. OLENDER, the defendant called on his own behalf testified:

I am the sole owner and proprietor of the Army and Navy Store in Oakland. (R. 325.)

(After stating some details of his education and business experiences and the fact that his father and uncle turned over a store to him in Fresno in 1920, and narrating certain details of his business career (R. 326-335) the witness identified a series of checks which were marked defendant's exhibit F for identification. (R. 336.))

Defendant's exhibits F and F-1, four pages of checks for identification represent payments on my checks with my name printed on the side, signed by me to my father, my uncle, and to the partnership of my father and my uncle, in the years 1920 and 1921. (R. 345.) Those checks do not represent all the payments I made to my father and my uncle. I married in 1924. (R. 349.)

I had an interest in the Olender building in Fresno during the years 1945 and 1946. I have had an interest in it since the death of my father in 1940, although I

actually didn't get the interest until the estate was closed which was about in 1940. (R. 352.)

(Here the witness details his activities from 1926 to about 1942, showing the accumulation of funds to the extent of $75,000. (R. 359-364.))

I got $75,000 out of that safe following my father's death which was sometime during 1942. I brought the money to the Bank of America at 12th and Broadway, Oakland, and put it in my safe deposit box, and I believe I had other funds in that box at that time. At first only I had access to that box. I believe I first got that box in 1942. (R. 365.) If Mr. Carroll of the Bank of America had given you all the records, there is a record of another box which I rented in 1942 and in 1943, as is in evidence I rented a larger box. Following my father's death I assisted my mother in the direction of her business affairs and continued to do so until the time of her death. In that period of time she made advances of funds to me, as I had the safety deposit box in the Bank of America at 12th and Broadway with my wife, I subsequently opened another box and that box was a joint box with my mother and me. (R. 366.) My mother and I were partners in all of our Fresno properties and I was handling those properties. I had all of the leases, all the insurance policies, and all of the papers connected with the property, and when my mother came up in 1944 just a short time before that I opened that box, and she came up here to stay at my home while my wife and I went to visit my son in Denver who was then at the airfield in Denver, and she brought with her at that time $20,000

in currency, and we opened the box and put that money in that box at the time. (R. 366.) As a result of certain communications from my mother I subsequently invested that money in Government bonds. (R. 366.) From 1941, I believe until about 1943-4, I am not sure, I borrowed a total of $33,500 from mother, which are on my books and show that sum, and I repaid her by checks from my business and which are reflected in her bank accounts during the years 1943, '44 and '45. (R. 367.) I believe it was in 1949 that I purchased this $20,000 worth of bonds for my mother. The five books now shown me are the books of the Army and Navy Store for the years 1943 through 1946. They were maintained by my bookkeeper Vera Manger. (R. 369-370.)[9]

During the years 1942, '43, '44, '45 and '46 I was operating the Army and Navy Store at 10th and Broadway in Oakland. (R. 371.) I ordinarily had about three employees in that store. About the month of April '44, I visited my youngest son at San Antonio, Texas. On certain information I received as to the availability of an Army and Navy store in San Antonio, I made business preparations for that trip. (R. 372.) I went to see my attorney, Monroe Friedman, and told him I was going on this trip. I asked him to go down to the vault with me to sign on the box and I would remove the name of my wife and during the period that I would be gone he would be the sole person that could enter that box. (R. 373.) I told him that I had the prospects of buying a store in San Antonio and that I was taking some cash with me

[9]Books admitted as Defendant's Exhibits H, I, J, K and L.

but that I didn't know how much I needed; that if I needed more he was to go to the bank and buy a cashier's check and send it to me. Before I had brought Monroe Friedman to examine the contents of the box, I had taken out somewhere between five and ten thousand dollars. I don't remember the exact amount. About the time, in 1948 when I received a call from Mr. Root, the Bureau of Internal Revenue, and about the time I dealt with Mr. Ringo, I went to see Monroe Friedman, the present judge. (R. 373-4.) I recognize Defendant's Exhibit D; that is the affidavit of Monroe Friedman as to our dealings on the safety deposit box during April and May of 1944. (R. 375.) As a result of my conversation with Mr. Friedman this affidavit was executed. When I got to San Antonio I did not buy the store. (R. 376-7.) I took Mr. Friedman off the box after he, as he states in his affidavit, had checked it to see that it was in the same condition that it was when he went into it and I put my wife back on it.

During the war years and particularly 1945 and 1946 I had many transactions with the Money Back Smith Co. There were purchases made by me during the years '44 and '45 and '46, some of them made by cash and some of that made by check, but all recorded on my books and on Money Back Smith's books. (R. 377.) They were goods that weren't easy to get. Money Back Smith had buyers in New York, all throughout the East, and I had nobody but myself, as Mr. Lorenzen has testified, they received merchandise which, as the name implied by Money Back Smith, that if it wasn't satisfactory perfectly they would replace it or give him money back. I went to Money Back

Smith, and I could use merchandise of that type. They were underwear, hosiery, shirts and sweaters. The invoices would show what they were, I don't remember just what the specific items were. Very few of the invoices ran over $500. (R. 379.)

The Asturias Corporation was started by two men, Rodney Asturias, Mr. Ben Neiden, who testified here this last week in regard to the stock. It was a doubtful proposition from the very beginning. (R. 379.) The second transaction of $5000 with this firm was not in its inception a purchase of stock. I advanced money to the corporation. (R. 379-80.) I recognize a letter written by Jefferson E. Peyser which is now being shown me.

(The said letter was admitted in evidence as Defendant's Exhibit M.)

I received the shares of stock on January 2, 1948. I made the payment of the second $5000 to the Asturias Company in, I believe, December 1946. That was a loan. (R. 382.) I didn't get the stock until 1948. When the company looked like it was broke I believe somebody suggested that the best way to collect on the thing, if you were going to put it in the income tax return as a loss, is to have it in the form of shares of stock and then the Government would rule on the fact that it was valueless and could then take your loss. But I do know that the stock, as the minutes will show, was ordered to be purchased at least a half a dozen times and before it ever went to the board the company was declared absolutely bankrupt and when they sent us the stock they were just sending us wallpaper. (R. 368.)

(Certain inventories of the Army and Navy Store at the end of 1944, '45 and '46 were marked for identification as Defendant's Exhibit N. (R. 383-4.))

(A certain invoice purported to be reflected in Government's Exhibits 40, 40A and 40B, and being a bill sent to the defendant by Mr. Saraga for the purchase of 1000 sailor suits was admitted in evidence as Defendant's Exhibit O. (R. 386.))

I did not directly enter into any transactions with George Goodman in New York but through a Mr. Leavy. As a result of those negotiations, I withdrew $20,550 from my safety deposit box in the Bank of America. I bought about four or five cashier's checks, made out under Mr. Leavy's direction to Mr. George Goodman whom I had never met and don't know. Mr. Leavy secured those suits for me through Mr. George Goodman and where Mr. Goodman got them I don't know. (R. 386.) The entry in Government's Exhibit 25, "Olender, Cash on Hand and in Banks" and the entry "the following sums were expended from cash January 10, 1944, three cashier's checks to Goodman amounting to $2250 each; January 22, 1944, three cashier's checks to Goodman at $2250 each; January 22, 1944, three cashier's checks at $2350 each to Goodman" refers, I believe, to this transaction I had with Mr. Goodman. (R. 387.)

The uniforms I received from Goodman (referring to Defendant's Exhibit M) as of December 31, 1944 or January 1, 1945, were not reflected in my inventory for that year; as of January 1, 1946 some $8000 of them were reflected and in 1947 that had gone down to $2000. (R. 387.)

I received those uniforms as a result of those checks I gave to Mr. Goodman; the uniforms did not correspond with my specifications—I ordered sizes 34-35-36 and 37s, the average sizes of 90% of the sailors in service; I received suits marked with those numbers but the 34s were 38s, the 35s were 39s and the 36s were 40s and the sizes went as high as 44s. It is almost impossible to sell suits of that size unless you have a tailor right in your establishment to cut them down. (R. 398-9.) I immediately complained to Mr. Levy about them.

About June of 1945 Mr. Leavy told me he knew where he could dispose of 200 of those suits if I would send them over to him. He returned the cash for those 200 suits, some $5000, to me which I deposited in my store account. Sometime in July or August 1945 Mr. Leavy had disposed of about 280 suits totaling around $7,000 and he took that money to New York and gave that to Mr. Saraga as a deposit on suits for me, which Saraga did not deliver. Those funds were returned to me at some time. (R. 399-400.) Government's Exhibits 41 and 42 are checks which were returned to me by Saraga. (R. 400.) I sent $20,550 to Mr. Goodman in payment for certain uniforms. (R. 402.) I found those uniforms unmerchandisable from my standpoint and then I attempted to dispose of them on a wholesale basis, and Mr. Leavy assisted me in that respect and sold about $5000 worth of them. (R. 402.) I got that $20,550 out of my safety deposit box sometime in January 1944. I purchased cashier's checks made out to Mr. George Goodman at the suggestion of Mr. Leavy, and I turned those checks over physically to

Mr. Leavy. I subsequently received $20,550 worth of uniforms from Mr. Goodman. I found I could not dispose of them so I attempted to sell them on a wholesale basis; Mr. Levy sold 200 at $25 a suit—$5000 (R. 403) which I deposited in the Army and Navy Store bank account.

There were 342 suits left, after selling 200 to Mr. Lerman and 280 suits which Mr. Levy disposed of, of those 342 suits some 20 had been sold in my store, put in my cash register and recorded as sales—at the end of the year the 322 suits were included in my inventory. (R. 411.) Most of those suits came in to me in 1944. (R. 412.) I ultimately attempted to show all the transactions with Mr. Levy, Mr. Goodman and Mr. Saraga on my books. (R. 422.)

In 1945 I received $2500 from Mrs. Foote, my wife's mother. (R. 422.) Mrs. Foote had been saving up money for several years and she was in her eighties, she had lived with me practically since the day I was married until 1939 and she gave me that money for a specific purpose; I gave that money to my wife to deposit in her bank account. (R. 423.)

At the time the money was counted out in my box at the Bank of America in the presence of Judge Monroe Friedman there was $75,000 there. (R. 423.)

When I learned the United States was questioning my income tax declarations, I went to my banker and personal adviser, Mr. Reinhard. That was early in 1948. (R. 423.) I told Mr. Reinhard that I was having some difficulties, that they were questioning some of my T.C.R. returns and some bond purchases which I had made over

the counter with him and a business transaction which I could explain, but that I wanted to get an accountant and a tax attorney. I did not want two men. I did not want an attorney and an accountant separately, but I wanted a combination of the two in one man, and he said that he knew of such a man. He said the firm of D. A. Sargent & Company had a tax attorney and accountant as a partner of Mr. Sargent in the firm. (R. 424.) I went to see Mr. Sargent and told him just what I wanted and the type of person I wanted. Mr. Ringo came to my store and I explained to him just exactly what I wanted, and told him that I wanted an attorney as well as an accountant. I retained Mr. Ringo at that time to carry out all my tax matters. (R. 425.) In my net worth statement there are many items concerning my mother, who was 70 years old and not in good health, and I didn't want any of those items disclosed. I don't think they are part of any one else's business but my mother's and mine. (R. 426.) None of that $75,000 which I brought from Fresno and deposited in my safety deposit box came to me from my father's estate. The names on Government's Exhibit No. 20 for identification now shown me, a partnership return for the year 1946, are Olender, Hamilton, Kaplan and Gambor. Olender represents Mrs. J. Olender, my mother and me; Hamilton is Martha Hamilton, my cousin; Gambor is Terris Olender Gambor, my sister. (R. 427.)

I received gifts from my mother during the years 1944 and 1945. I don't remember the exact sums, but they are reported in the net worth statement. There were two or three thousand dollars at a time two or three times a year. (R. 427.) From reading Schedule A of Government's

Exhibit No. 25 for identification, I refresh my memory as to the gifts I received from my mother, during 1944, '45 and '46. On January 6, 1944 there was a $2000 gift; on July 5, 1944, $2500; on December 15, 1944, $1000; on January 2, 1945, $3000. (R. 428.)

I prepared the partnership return for the year 1946 which is marked U. S. Exhibit No. 20 for identification. There is a reference in that partnership return to a sale of the River Dale Ranch. In the partnership breakdown, there is a missing sheet which was filed with this return. It was called "Schedule 1040" which reported in detail the sale of that ranch. It was stapled on here originally and is not on this return. (R. 429.) I also prepared a similar form of partnership return for the year 1946 and a schedule of gains and losses, which is Schedule D, Form 1040 U. S. Government forms for income tax purposes. These forms are from my files and are my own copies of the returns that were made on the partnership. It refers to the sale of the River Dale property which was sold in 1946. (R. 430.) I submitted that with the partnership return and that was the form given to me by the Internal Revenue Office in Oakland to file with this partnership return. The State of California partnership return of income, Form 565 now shown me is a yellow duplicate copy of a return for the same partnership which was filed with the State of California for the year 1946. (R. 431.) I typed all those forms myself.[10]

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[10]The State and Federal returns admitted as Defendant's Exhibits Q and P. (R. 433.)

(Cross-examination.) I took about three courses in accounting during my four years attendance at the University of California. I prepared the tax returns for myself and for my wife for the years 1945 and 1946. They are exhibits 1, 2, 3 and 4 in evidence. I have prepared income tax returns for other persons—my mother, my sister, my son and daughter, employees in my store who had just wages and such, and for a few friends. I have received compensation for preparing income tax returns for others. (R. 434.) I did not do the auditing work for the concern owned by my uncle and my father which was operated by them in Fresno. I worked for that firm for a very short period. (R. 435.) I filed the affidavit now shown me, in which I stated I was a trained accountant.

My late father died in 1940. I believe his estate was probated in the City and County of Los Angeles. I did some of the accounting work for my father's estate, it actually wasn't accounting. I did not prepare the estate tax returns. (R. 439.) The $75,000 that was in a vault in Fresno at the time of my father's death was not included in the estate tax return. (R. 441.) My sister did not know that my father had $75,000 at the vault in Fresno, but my mother did. (R. 443.) I did not tell the inheritance tax appraisers that I had received gifts in the amount of $5000 for a period of ten years prior to my father's death. I did not to my recollection see the estate tax returns of my father before they were filed. (R. 446.)

I can identify the signature of my mother only on the Government's Exhibit 46, the estate tax return of my late

father, I do not know the signature of the other party. (R. 448.) My sister was the attorney for the estate. She is a former deputy district attorney of Los Angeles. (R. 451.)

I recall the testimony of Mr. Ringo that he did certain work for me in connection with the preparation of my net worth statements. (R. 447.)

(The Court after argument and over the objection of the counsel ruled that statements made by the witness, Mr. Ringo, were admissible in evidence and were not privileged as communications from a client to an attorney. (R. 456.))

Mr. Ringo gave me a list of questions concerning my assets and I returned some of them with my answers. I do not recognize the handwriting with respect to item 19 consisting of figures $6000, $19,000, $42,000, $7200 and the total figure $75,000. (R. 457.) The figures, decrease in 1943, $6000; decease in 1944 (Goodman deal) $19,000; decrease in 1945, $42,800; decrease in 1946, $7200 and the total, $75,000 have no meaning to me at all. (R. 457.) I must have seen the original of that document you show me as there is some of my handwriting on it. (R. 458.) The signatures which appear written out in pencil and numbered are not in my handwriting. I do not know whether all the figures on the left hand side of the document are mine, everything here in green ink is mine. (Note: It is impossible to tell from answers of the witness (R. 458-9), whether he means everything in green ink on the document was in his handwriting or that some of it was not.) The numbers in pencil which appear

at the right are not in my handwriting. I have no recollection of seeing that document before. I do not recall giving to Mr. Ringo the information which has been put there in pencil in numerals. I have no recollection whatever of giving that information to Mr. Ringo with respect to the figures in item number 19 which total $75,000. (R. 459.)

Exhibit P which is the partnership return for 1946 was prepared in Oakland in the early part of '47 at my place of business. (R. 460.) The partnership wasn't actually a partnership, it is a joint tenancy or ownership in common or something of that sort. (R. 461.)

To the best of my knowledge the life insurance policy referred to in Government's Exhibit 24 was paid for with the $15,000 I took out of my business account and deposited in my personal account. I believe a personal check was issued and a cashier's check was purchased with it. (R. 466.) I kept the money that I received from Mrs. Foote until December and then deposited it with some other funds in my personal bank account. It was for the purpose of purchasing a home for her grandson and my wife's son. (R. 467.) The item Cash in Banks (Mrs. Betty Olender) for the year 1946 in Government Exhibit No. 15 which is the stipulation admitted in evidence is correct. I never told Mr. Whiteside and Mr. Root I received $3000 from Mrs. Foote in order to enable her to qualify for old age benefits. (R. 469.) The Riverdale ranch property was sold for $20,000. I had a one-sixth interest in that property. (R. 472.) I believe I got the $20,550 with which I purchased the Goodman suits

from my safe deposit box. I did not deposit that sum to my business account. I used that sum to purchase cashier's checks. I did not deposit the sum in my business account and send Mr. Goodman the check for the purchase of the suits in the ordinary way, because there was no assurance that I was going to get these suits whatsoever, and if I had given Mr. Goodman a check on my store he wouldn't have accepted it. He wanted cashier's checks. I did not enter those purchases on my books at that time because when the merchandise arrived, it was unsatisfactory and I wanted to return it immediately. (R. 476-7.) I did not pick up these suits in my inventory as of the beginning of 1945 because most of them were sitting in my basement as I had received them, and I just let them sit there waiting the ultimate outcome of Mr. Leavy's transactions, trying to return them. I didn't pick them up in the inventory because it was still an unsettled item. Mr. Leavy was going to give me either new suits or the money for those suits. I picked them up in the subsequent year because all of the transactions happened then. (R. 484.)

(Redirect Examination.) I received the Asturias Import Export Corporation stock in 1948. The note now shown me is signed by the vice-president of that company (R. 510),[11] which they gave me for $5000 I loaned them.

I subsequently received securities from that corporation. (R. 512.) My sales to 1940 were never $10,000 in any year. My income tax returns will show that. My

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[11]The note is dated Dec. 12, 1946, payable ninety days after date to order of Milton H. Olender and signed Asturias Import Export Corporation, by its vice-president. (Defendant's Exhibit R.)

sales volume for the years '44, '45, and '46, would be better than $200,000 a year. (R. 516.)

I have testified that during the period of time from approximately 1930 to 1939, my father made gifts to me of approximately $5000 each year in cash and placed it in the vault in the Olender Building in Fresno. That was not a gift for me alone, it was for me and my wife. I placed that money in 1942 in the safe deposit box in Oakland belonging to me and my wife. (R. 529.) The two letters now shown me are letters from my mother to me. I had correspondence with my mother in reference to the purchase of some investment for her. Mother and I opened a joint safe deposit box with the Bank of America. Following this correspondence I purchased some Treasury bearer bonds for my mother and placed them in our joint safe deposit box. (R. 531.)

The specific purpose of the $2500 given to me by Mrs. Foote was that the money was to be given to my stepson, Richard Raymond Busby. (R. 562.)[12]

(Redirect Examination.) The two photostats designated as Defendant's Exhibit Z for identification are two cashier's checks, all dated December 12, 1944, for $248.26 and the other dated November 9, 1944, for $1911.77 made out to Barney Clothier Shop. At the request of Mr. Barney, from whom I had purchased that amount of merchandise, I purchased these two cashier's checks, with cash in the Bank of America and mailed them to him or

[12]Bank book, savings account, Bank of America, of Mrs. Betty Olender showing a withdrawal of $2500 on May 12, 1947 and a deposit slip showing a deposit on the same day of $2500 to account of R. R. Busby, marked Defendant's Exhibits T and U. (R. 563.)

gave them to his brother. These checks were in payment for merchandise I had bought from him. (R. 604.) They were not for sailors' suits. They were for fifty or sixty items of merchandise on the invoice there. (R. 604.)

(Recross Examination.) I don't remember from what sources the cash came to pay for these cashier's checks. I haven't any record which would indicate the source of the cash. (R. 607.) I believe that this particular transaction was discovered by my accountant after the stipulation was entered into. I didn't work with the accountants. They did all the work. I don't remember whether the accountant asked from what source the cash came. There is no question in my mind that in November and December, 1944, I purchased these two cashier's checks. My name doesn't appear. Neither does the name of the Army and Navy Store. (R. 607.)

MILTON H. OLENDER, recalled for further direct examination:

My source of income during the period of 1944, 1945 and 1946 were first, from the Army & Navy Store; and secondly, the income from my rental property in Fresno; and then there was third, the income from stocks and bonds listed in Mr. Ringo's net worth statement; and, fourth, the gifts and such from my mother; and also the money entrusted to me by Mrs. Foote; and then lastly my safe deposit box. If I dealt in any cash transactions during this period of time, the cash would either have to come from my bank accounts, or from my safe deposit box. (R. 752.) I drew a final check of $5000 to clear this account payable to the Asturias Export and Import

Company. (R. 783.) That was the investment and securities which I later deemed worthless. (R. 756.)

(The witness then testified as to various expenditures and disbursements made by him and identified various bank accounts and checks. He testified that the following expenditures made by him came out of the cash in his safe deposit box, to-wit, $15,000 that was deposited on November 20, 1945 in trustee accounts for his three children (R. 766); that before he put Judge Monroe Friedman's name on his safe deposit box he had drawn between $5000 and $10,000 therefrom. (R. 769.) The information I gave Mr. Ringo about a purchase of bonds in 1944 was in the amount of $8000 that came out of my safe deposit box. (R. 772.) The cashier's checks purchased in the month of May, 1945 totalling $15,000 must have come from the safe deposit box. (R. 773.) The $20,550 came from my safe deposit box. (R. 776.) The two cashier's checks that I purchased which were sent to Los Angeles to pay Barney came out of my safe deposit box. (R. 799.) The $5000 which is represented on Defendant's Exhibit "AB" came from my safe deposit box as far as I can remember. It represents a deposit. (R. 821.)

ROLAND D. HELLMAN, called for the defendant:

I am a public accountant, registered in the State of California. Before I started practicing, I was an Internal Revenue agent five and a half years. My general assignment was all income tax cases. (R. 577.) Defendant's Exhibit G now shown me, which is a thousand dollar check, was drawn on December 23, 1944. The check was paid, deposited, on January 10, 1945. (R. 578.) The sum

of $19,881.55 set forth in the stipulation as "Cash in bank, the Army and Navy Store, (net after outstanding checks)" is the balance after this check was issued. (R. 579.)

(The check which had been marked Defendant's Exhibit G for identification admitted in evidence.)

This check for $1000 was one of the checks that was outstanding as of December 31, 1944. That is not included in the $19,881.55 balance shown by the books. It had been already subtracted from the total in the banks. (R. 581.) It was therefore a cash item in Mr. Olender's hand. I know that it is not in the figure that was stipulated by looking at the books. (R. 582.) I have had access to Mr. Olender's books. I also had available and looked over Mr. Saraga's books. (R. 585.) I prepared the chart now shown me. (Defendant's Exhibit AL, see appendix.) The chart starts out with this $20,550 cash that Mr. Olender took from his safe deposit box, and we follow it from there. Right to begin with at the top of the chart you see Mr. Olender on the left hand side. On the right side is Mr. Olender's business, which is the Army & Navy Store. The reason this chart is made up this way is to show the flow of personal funds, some of which went into the business and some of which remained in his personal possession. (R. 586.) On the right it says the $5000 was deposited in the store bank account on June 19, 1945. That was handled through the general journal.

The date in the general journal of June 1945 when this entry was made debiting cash to the bank for $23,000, we find that he deposited on June of 1945—made up deposits

for $23,000, broken down as follows: One check in the amount of $10,000 to represent the money he borrowed from Mr. Blackstone; two checks of $2500 each, which were checks through Leavy, and there is a $5000 item and a $3000 item which represent cashier's checks deposited that had previously been purchased—Mr. Olender's own cashier's checks. (R. 590.) As an account practice the $5000 received from Lerman, deposited in the store bank account June 19, 1945, was an additional investment credited to the M. Olender capital account on the bank books.

Now, the second part of the $20,500 item—the arrows point to the right there indicating going into the Army-Navy Store for 342 suits unsold by Leavy, transferred to the store, $8550. These were not charged to purchases on the store books. Twenty suits were sold through routine sales by ringing them upon the cash register, which is common practice. By transferring this $8550 worth of merchandise into the Army-Navy Store, and by ringing up the sales of the 20 suits on the register and by not charging purchase expense, the cost of the goods purchased on the books, it meant that Mr. Olender contributed $8500 worth of merchandise to the store and never took any credit on the books for having done so, which means when the merchandise was sold, it all became profit—that is, profit on the books. He had his original cost when he purchased with cash. By taking the merchandise into inventory, the portion was taken into inventory at the end of '45. By increasing his inventory, it reduced his overall cost during the year for the other sales made, and that resulted in the understatement of the cost of the goods that he actually sold during the year and resulting in

corresponding overstatement of profit of $8550 for the year 1945. Mr. Olender's capital account should have been credited, but it was not. As a result, when the merchandise was taken into inventory, the result of that was for it to appear as an additional profit. (R. 591-3.)

The net income on the return of Milton Olender for the year ending December 31, 1945, as shown by Government Exhibit 1, was $44,718.48. That was before nonbusiness deductions. $41,067.61 is the total net income reported on the returns of the husband and wife for 1945. (R. 609.) The effect of putting in $8550 worth of assets into the inventory without charging it to purchases on the store books on the net income of the taxpayer would be to reduce the profit shown from the business. The return shows the merchandise purchased during the year of $150,458.30. If the $8550 would have been added to that, it would have increased the purchases to $159,008.30. The effect of that would have reduced the profit from the store operations from $42,722.61 to $34,172.61, thus reducing the net income reported from $41,067.61 to $32,517.61. (R. 610.) Following the chart on the left side where it states, "280 suits sold by Levy for M. Olender, $7,000", represents proceeds turned over to Mr. Saraga by Mr. Levy for additional merchandise to be bought for Mr. Olender in August of 1945. The cash was not received by Mr. Olender, but Mr. Levy after making this sale, kept the cash or the proceeds. However, he received the $7000, and that was turned over to Mr. Saraga. This is recorded in Mr. Olender's books. I find that transaction in Mr. Saraga's books. On page 84 under date of August 1, 1945 there is an entry of cash receipts from L. Levy for $7000.

(R. 611.) The United States Exhibit No. 41 is a check from Mr. Saraga, dated November 15, 1945, made payable to the Order of the Army and Navy Store in the amount of $7725. (R. 612.) It was possibly to clarify it and show the chain of events, how the $725 arose and also to point out that the Saraga transactions as being on the books and as it is merely following through, as he says, the other checks, the original checks drawn to Saraga in evidence showing that a total of $24,500 was paid to Mr. Saraga through Levy and that the invoice which reads for 1000 suits was changed to read for 951 suits at a total of $23,775, indicating that if Mr. Olender had paid $24,500 there would have been a refund of $725 due from Saraga which Saraga did make and add to the other $7000 which we were previously talking about, making up the total of $7725 that did go into Mr. Olender's personal bank account. (R. 614.)

(Then followed an extended discussion between the Court and counsel dealing chiefly with the method of accounting and their respective theories to the effect of the evidence.) (R. 637-759.)

(Here the witness explains the entire Saraga transaction based upon Saraga's books and the accounts of appellant, as all of which are set forth in Schedule 2 of Defendant's Exhibit "AL" which is set forth in the appendix.) (R. 648 to 658.)

Exhibit W is a purchase invoice from Barney's Clothes Shop, Los Angeles, in the amount of $2111.67. It is dated October 30, 1944. There is also an invoice dated November 30, 1944, in the amount of $248.26. Exhibit Z, two checks, cashier's checks drawn on the Bank of America, Oakland,

one of them dated November 9, 1944, in the amount of $1911.77, is to Barney's Clothes Shop, endorsed by Barney's Clothes Shop, and cleared through the bank in Los Angeles on November 15, it appears. The other check is dated December 12, 1944, cashier's check on the Bank of America in the amount of $248.26, endorsed by Barney's Clothes Shop, deposited on December 20, 1944. (R. 688-9.) These items appear on Mr. Olender's books under Exhibit I—that's the purchase register—under date of October 30, 1944, purchase of $1911.77, and another purchase on November 30, in the amount of $248.26. I might correct myself. When I read this invoice, the first one that I referred to, as to the total of $2111.67 that figure was as stated on the invoice, but the adding machine tape of the items on this page only total $1911.77, an error of $200 in addition. The actual amount of the check is for $1911.77. These were entered in Mr. Olender's books under purchases under the dates of October 30th and November 30th, with charges to purchases and expense, and a credit to accounts payable, that is, a liability of Mr. Olender to make this payment. Now as testified by Mr. Olender, these cashier's checks were purchased from cash funds, not from store funds. Therefore the invoices had been recorded on the books as a purchase and the amounts owing had been recorded. As evidenced by these checks, they were paid for in 1944. (R. 689.) However, the books indicate that he owed this money at the end of 1944. In February of 1945 an entry is made in the general journal of Mr. Olender's books under date of February 28th—that is in the general journal, Exhibit J—charging—reducing accounts payable by total of $6803.02, and credit-

ing Mr. Olender's capital account, the investment account, for $6903.02, with an explanation, "To record cash payments covering purchases from Money Back Smith and Barney's Clothes Shop". (R. 690.) The effect of that was, the books stated that at the end of 1944 Mr. Olender owed this amount of money. Yet we have shown on the Barney transaction, which is part of the $6903.02, that that amount in fact had been paid by Mr. Olender with personal funds and therefore in February the store, February '45, the bookkeeper made an entry crediting his capital account and reducing the accounts payable which had been erroneously set up at the end of '44. (R. 690.) The original entry in Mr. Olender's books, general journal 17, under date of February 28 which I just read. I will repeat. The debit was to accounts payable, $6903.02. The credit was to M. Olender investment. The explanation of that journal entry is to record cash payments covering purchases from Money Back Smith and Barney's Clothes Shop. That is taken from Mr. Olender's original books which were kept by his bookkeeper. (R. 692.) Referring back to Exhibit I, Purchase Register, Mr. Olender, page 22, under date of 1944, February 8th, an item of $750 for purchases. There is also $22.95 for freight, making total accounts payable $772.95. Under date of February 3, $425 for purchases, $25 accounts payable—debit and credit. February 2, Money Back Smith, $1035 purchases, $13.57 freight, $1048.57, credit to accounts payable. February 24, $950.33 purchases, $950.33 accounts payable. February 24, $657 purchases, $13.22 freight, $679.31 accounts payable. March 15, $468.88 purchases, $11.77 freight, $480—correction. $11.70 freight, $480.58 accounts payable. March 8,

$318 purchases, $318 accounts payable. March 2, $68.25 purchases, the same amount, $68.25, payable. Those items add up to a total $4742.99, which, when added to the Barney purchases of $2160.03, make a total of $6903.02, which I just identified as being credited to Mr. Olender's capital account in February of 1945. These Money Back Smith purchases were posted from the purchases register into the accounts payable in the general register. They are a part of the total shown on this page, of $14,452.24 of credits to accounts payable, and that items is posted in the accounts payable record as being owing at the end of 1944. (R. 693-4.) Assuming that the evidence supports the payments by cash by Mr. Olender, not from the store, for the Barney items and the Money Back Smith items, the amount of the overstatement of the accounts payable as of December 31, 1944, would be $6903.02. That overstatement would increase his net worth by crediting him with the cash that had been used to pay for this merchandise. By increasing the net worth at the end of 1944, under the net worth method there would be a decrease in the net income as computed on net worth basis at the end of 1945. (R. 695.) The $1000 check, Defendant's Exhibit G, deposited in his personal bank account January 10, 1945, and referred to as an outstanding check during that period, would increase the net worth of the defendant at the end of 1944 by $1000. (R. 696.) Defendant's Exhibit X for identification would reduce the net income on a net worth basis for the year 1945 by $1000. (R. 697.)

Counsel for the defendant put the following hypothetical question to the witness and received the following answer: Q. Assuming in the year 1944 the defendant purchased

and received from Goodman 822 suits at $25 each and the total of $20,550 paid represented personal cash funds taken from his safe deposit box and that the sailors' suits were ultimately disposed of as follows: 1. 200 suits in 1945 sold through Leavy to Lerman for $5000. 2. 280 suits in 1945 sold through Leavy for $7000. The proceeds remaining in Leavy's hands until turned over to Saraga in August, 1945, as shown in Saraga's books. 3. 342 suits of an aggregate cost of $8550 transferred into the stock of the Army and Navy Store, 20 suits being sold through the course of trade, and 322 suits being included in the store inventory as of December 31, 1945. Assuming further that the original purchase of the 822 suits from Goodman was not entered in the books of the Army & Navy Store as inventory before December 31, 1944, and that the $5000 proceeds from the sale to Lerman was entered on the books of the Army & Navy Store as capital investment, the money having been deposited in the store bank account. Assume further that the $7000 proceeds from sales by Leavy were returned to Mr. Olender in 1945, augmented by $725 as represented by U. S. Exhibit 41, and as set forth in Schedule 1 of the survey that we passed out, which sum of $7725 defendant turned over to Leavy for transmission to Saraga in 1945. Assume further that the sum of $7725 had not been returned to the defendant until 1946 and was then deposited in his personal bank account. Based upon the foregoing assumptions, what is the effect of the Goodman transactions upon the defendant's net worth at the end of 1944 and 1945, respectively?

A. Based upon the assumptions in your question, the effect of the Goodman transaction in the net worth of Mr. Olender is as follows: In addition to the assets listed in the net worth computation made by the Government, Mr. Olender had an asset as of December 31, 1944 of $20,550, which asset consisted of 822 sailors' suits in the basement, which were segregated and not included in the store inventory as of December 31, 1944, as shown by Exhibit N. That asset was not taken into account by the Government in their list of assets shown by the net worth statement. The Court. As of what time, Mr. Witness, $20,550 —as of what time? A. December 31, 1944. As of December 31, 1945 the net worth would have been $7725 more due to at that time the Saraga check being in the possession of Leavy, at the end of 1945. The net effect of that on an income basis, net worth income basis, is that comparing on the Government's schedule is to reduce income in 1945 by $12,825 and reducing the net income in 1946 by $7725. (R. 711-713.)

(Thereupon Defendant's Exhibits W and Z for identification were received in evidence.)

ROLAND HELLMAN, recalled for the defendant:

I have read all the transcript in this case. I personally went to the Bank of America and examined these deposits of the taxpayer. These schedules I have made are my accounting interpretations of the testimony and the Exhibits in this case. (The document referred to here admitted in evidence as Defendant's Exhibit SA.)

(Certain summaries prepared by counsel for the defendant were admitted in evidence as U. S. Exhibit 51. (R. 887.))

(The witness testified from defense Exhibits AD, AF, AG, Z, AB, AC, and G in evidence. Testified to the entry item by item and summarized the Government's computations of the net worth of the defendant on December 31, for the year 1944 as $191,002.07, for the year 1945 as $260,113.29, and for 1946 as $283,193.62. (R. 892-902.))

The witness then gave his explanation and computations as to what is claimed to be errors in the Government's computations and the facts and evidence on which he based his results. (R. 902-909.) That based upon the foregoing the appellant's net worth as of December 31, 1944 was $241,495.06 (R. 909); that $20,000 included in the Government's estimate of bonds had to be deducted therefrom and that defendant's net worth as of December 31, 1945 was $271,463.72 (R. 910); that defendant's net worth as of December 31, 1946 was $265,833.38 (R. 911); that according to the witness' computations the combined tax liability for the year 1945 was $16,510.83 as against the tax reported on the returns of $15,495.75 (R. 920); that the underpayment of tax for that year was $1015.08; that the tax liability for the year 1946 was $4,417.02 and the amount of tax actually paid by appellant was $5,562.79, resulting in an overpayment of tax for the year 1946 of $1,145.77. (R. 920.)

(The cross-examination of the witness Hellman will be found in the record from pages 940 to 1071.)

VERA MANGER, called by the defendant:

I have known Mr. Olender, the defendant in this case, about ten years. In 1943 I was employed as bookkeeper

by the Dorfman Hat Company in Oakland. Mr. Olender was a very good customer and they allowed me to set up his books for a couple of hours a week. (R. 824.) His set of books were very vague and I had to set them up myself; the books were inadequate. Defendant's Exhibit K, J, I and H in evidence are the books that I set up. The entries are in my handwriting. When I was employed by Mr. Olender he did not make any entries in those books; I made all those entries. (R. 824.) I took care of everything. He never told me where to put things in the book; I don't think he would know how. I recall that merchandise was very hard to get and I know that we sent out the checks before the merchandise and then they couldn't fill it, they would send the checks back. (R. 826.) At page 17 of Defendant's Exhibit J which is the general journal, there is an entry under date of February 28, 1945 reading "Account payable M. Olender." There is a debit to accounts payable and a credit to M. Olender investment account with an explanation to record cash payments covering purchases from Money Back Smith and Barney's Clothes Shop in the amount of $6932. That entry is in my handwriting. This is an entry that when I went to pay the check, I found that he had paid that out of his personal account so then I debited the accounts payable and then credited his investment account. (R. 827.) In all the time that I was employed by the defendant he did not attempt to dictate the bookkeeping policy to me. That was entirely my job.

4. Government's rebuttal.

R. L. McNAB, called on behalf of the Government, testified:

I am employed by the Bank of America in Fresno. (R. 929.) In response to a subpoena which was served upon me. I have brought with me from the Bank of America savings account records for the account No. 3942 in the names of Mrs. J. or Mollie Olender for the years 1942 to 1945, and the bank records pertaining to account 2146 in the name of Mrs. J. Olender for the year 1942; I also have with me savings account No. 126 in the names of Terrys Olender Gambor for the years 1942 through 1946; I also have with me all the ledger sheets and deposit tags for the commercial account of Mrs. Mollie Olender for the years 1943 through 1946. (R. 929-930.)

(The said records were admitted in evidence as one collective exhibit U. S. No. 52.)

The records in connection with No. 3941 in the name of Mrs. J. Olender reflect a withdrawal on February 3, 1942 in the amount of $1000 and shows that it went into savings account 1246 in the name of Mrs. J. Olender. (R. 932.) The records show a withdrawal from account No. 3941 on March 31, 1943 in the amount of $1000 which went into the commercial account of Mrs. J. Olender and a withdrawal of $2000 from No. 3941 on January 6, 1944 which went into the savings account No. 126 in the names of Terrys Olender Gambor. (R. 932.) The records show a withdrawal from No. 3941 on December 15, 1944 in the amount of $1000 and went into the commercial account of Mrs. J. Olender and a withdrawal on January 2, 1945 of $3000 which went into the Terrys Olender

Gambor savings account No. 126. With respect to account 126 the records during the period in question show no withdrawals at all.

WILLIAM F. GAHURA, called by the Government, testified:

I am an employee of the Security First National Bank in Fresno and as such have access to the official records of the bank. (R. 937.) I have with me photostatic copies of records pertaining to a savings account in the name of Mr. J. Olender in addition to the ledger cards. (Admitted in evidence as U. S. collective Exhibit No. 53.) (R. 938.) The exhibit shows that on July 5, 1944 a withdrawal was made in the amount of $2500 and includes a withdrawal slip. I cannot state what the ultimate disposition of that sum of $2500 was. The records were mislaid or lost. (R. 939.)

MELBOURNE C. WHITESIDE, called by the Government:

I recall that a few days ago, His Honor expressed an interest with respect to purchases based on the sailor suits purchased by the defendant during the years 1944, 1945 and 1946. Last Monday the Government agents, together with Mr. Hellman, came in here and did some work on the purchase records in the form of invoices produced by the defendant. I have here some work sheets which summarize the work done at that time. These are carbon copies. At the time Mr. Hellman brought in the purchase invoices I went through each invoice, picked out those which indicated purchase of sailor suits, called them off to Mr. Hellman, and he made a tabulation and a carbon copy was made which was given to me. Those

work papers are in Mr. Hellman's writing. (R. 1085.) For the year 1944 we found that Mr. Olender had purchased 259 suits at a cost of $6,713.50. The price for the great part appears to be about $26.50. We did not work out an average. (R. 1086.) That schedule was prepared from invoices which were produced by Mr. Hellman. I accepted for the purpose of this schedule such invoices as were produced at the Court chambers by Mr. Hellman. In the year 1945 there were 1,578 suits purchased for a total cost of $35,656; in the year 1946 he purchased 385 suits at a total cost of $9,452. The invoices did not show sizes and we could find no record of sizes for any sailor suits purchased by the Army & Navy Store during the years 1944 to 1946 inclusive. (R. 1087-8.) In checking these invoices which were produced here in Court, I do not recall finding any invoices that were not recorded in the books. During the course of my investigation, Mr. Olender did not give me any invoices evidencing the purchase by him of sailor suits. The schedule now shown me, Government's Exhibit No. 25 for identification, is part of a sworn statement of assets and liabilities which was submitted to the Bureau of Internal Revenue just prior to the time I came into the investigation. (R. 1090.) I made a tabulation of Defendant's Exhibit AC, which is a ledger account of the bank account of Olender, and defendant's Exhibit AE which is a series of checks drawn on the same bank account of Milton Olender, a personal bank account. (R. 1095.) There were 14 of the 1944 and three of the 1945 checks not produced or not included in this pile. (R. 1095.)

We were unable to find any evidence whatsoever to indicate that the suits sold in 1945 had any bearing on the purchase in 1944, that is Goodman suits. (R. 1099.) On July 31 Mr. Olender purchased from M. Saraga 951 suits at $25, total amount $23,775. On August 28, he purchased 500 suits from Seagoing Uniform Company at $18 per suit for a total of $9,000. On November 6, he purchased 105 suits from Joe Asman at $22 per suit, totaling $2310. (A schedule of sailor suit purchases for the years 1944, 1945, 1946 in the handwriting of Mr. Hellman was admitted in evidence as U. S. Exhibit 54.)

We checked the five transfers from Mrs. Molly Olender's bank account to see whether there were withdrawals from those accounts through the close of 1946. The money which was transferred into the account Terrys, Olender, Gambor savings account 126, remained in that account. There was not withdrawals at any time. In fact, the money is still there. On account 2146 in the name of Mrs. J. Olender there are some small withdrawals but none in the amount of $1000 for a period of approximately two months; later there is a $1000 withdrawal. In the commercial account there are similar amounts which could be deemed a transfer out of the account. (R. 1101.) We discussed this matter with Mrs. Mollie Olender.

Thereupon the following proceedings occurred:

"Q. Now, Mr. Whiteside, as a result of your checking the bank records in Fresno here in evidence and as a result of your discussions with Mrs. Mollie Olender, I will ask you whether or not, for the purposes

of your report, you made a determination as to whether the six items represent gifts which were made by Milton Olender—strike that—which were made by Mrs. Mollie Olender to her son Milton?

Mr. Hagerty. Well, if your Honor please, again we will enter an objection. The question is both leading and suggestive. It also is again calling for the conclusion and opinion of the witness, and partially based on hearsay.

The Court. Overruled.

A. Yes, we made a determination on that.

Mr. Shelton. Q. What was that determination?

Mr. Hagerty. We enter the same objection, your Honor.

The Court. Overruled.

A. Our determination was that the gifts were not in fact made." (R. 1102-3.)

DONALD A. JENSEN, called by the Government:

I am Director of the Department of Public Welfare of Fresno County.

(The following testimony came in over the objection of counsel for the defendant.)

The Witness (continuing). In response to a subpoena I have brought with me the file of Mrs. Laura J. Foote from the official life of the Fresno Public Welfare Department, kept in the regular course of business. (R. 1124.)

Over objection of counsel for the defendant, the said file was admitted in evidence as United States Exhibit 55. (R. 1126.) [13]

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[13]The admitting of this file into evidence and the full substance thereof is fully set forth in Specification of Error No. 10.

CLIFFORD F. CARROLL, called in rebuttal testified:

I produced two records of loans made by Milton Olender (from Bank of America), one in 1945 and one in 1946 (R. 1151); the date of the first application is July 11, 1945, it was a 3 month loan of $30,000, the application states the funds were to be used to buy Naval uniforms and to liquidate part of the loan at maturity (R. 1152); the security Mr. Olender put was $10,000 U. S. Treasury Bonds of 1951-52, $13,000 U. S. Treasury Bonds of 1952-54, $8000 Treasury Bonds of 1952 and $1000 Treasury Bonds of 1956—total $32,000. (R. 1153.)

The second loan became effective on August 22, 1946, maturity date 11/30/46, for $10,000 (R. 1153); the application states it was to cover part of the purchase price of a new home; the collateral was $10,000 U. S. Treasury Bonds. (R. 1154.)[14]

This is a deposit slip in the amount of $15,000 dated June 1, 1945. (R. 1154.)[15] It was deposited in the commercial account of Milton H. Olender, it was a cash deposit-currency. (R. 1155.)

This ledger card covers the savings account No. 35225 in name of Betty Olender from December 20, 1945 to September 7, 1951. (R. 1157; marked U. S. Exhibit 61.)

The witness then produced cashier's checks issued December 5, 1945 for $10,000 and $15,000 (R. 1159); also four cashier's checks dated May 31, 1945 (all checks marked U. S. Exhibit 63, R. 1160); a cashier's check dated June 5, 1945 for $15,833.46. (U. S. Exhibit 64.)

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[14]The loan application of 1945 and 1946 marked U.S. Exhibit 57.
[15]Deposit slip marked U.S. Exhibit 58.

The witness produced 9 cashier's checks each being for $2250 or $2350, each payable to George Goodman. (U. S. Exhibit 65, R. 1161-2.)

A check drawn on Bank of America, dated May 24, 1945, drawn by Army & Navy Stores, commercial account, payable to Milton Olender for $15,000. (Defendant's Exhibit AQ, R. 1164.)

HUBERT C. MYTINGER, recalled on behalf of the Government:

In the computation made from the defendant's schedule as revised I computed the balance in the defendant's safe deposit box on July 11, 1945 as $61,347.43, the balance of cash in the safe deposit box after the withdrawal of June 9. (R. 1207.) The same computation for August 22, 1946 is a balance of cash of $17,939.76. If the non-deductible expenditure item of $1340.40 was expended after the 22nd day of August, 1946, the cash figure would be $19,280.16. (R. 1208.) Assuming that no record was kept by the defendant of amounts deposited in and withdrawn from his safe deposit box, and assuming further that the defendant had at least five sources of taxable income, and that the record of the deposits of the income from all sources have not been kept, and assuming that there is evidence that the defendant's business records do not reflect all his sales, and assuming that money was withdrawn from the defendant's business and used for business and other purposes not indicated on his records, it would be my opinion that it would not be sound accounting practice to assume that all unidentified or unreported deposits of cash by the defendant came only from his safe deposit box. (R. 1209.)

(This last testimony was admitted over the objection of defendant that it assumed facts not in evidence, was an attempt to usurp and invade the province of the jury, and called for an opinion upon a question of fact which it was for the jury to decide. This objection was overruled by the Court. (R. 1210.)

ROLAND HELLMAN, recalled by the defendant, testified:

In view of Mr. Carroll's testimony this morning, Mr. Mytinger was correct in as far as he went but he didn't cover the—he went—he covered this phase here and did not explain the result of the questions you asked him previously. In view of Mr. Carroll's testimony and his identification of the mark on the checks, the four cashier's checks were purchased then with proceeds from the store check 2396 which is in evidence here, Exhibit AQ. It was issued May 24, 1945 and cashed on June 1st, or exchanged on June 1st for these cashier's checks. However, this Exhibit, Government's Exhibit 58 showing a deposit of $15,000 on the same date, June 1st, into Mr. Olender's personal commercial account, the purpose of which is clearly evident, to buy cashier's checks; U. S. Exhibit 64 to purchase life insurance $15,833.46, which was covered by the stipulation as far as the asset was concerned. That is related, inasmuch as in working up this schedule we knew there were the two $15,000 items, and schedule 4, to the extent that it detailed the four cashier's checks as having been purchased from the safe deposit funds, is incorrect but would also be incorrect then to the extent that it fails to take into consideration a transfer of $15,000, presumably from cash in the safe deposit box,

into the personal bank account from which he purchased the life insurance. So it is a wash transaction. One $15,000 item comes out; the other $15,000 item goes in. So it washes out entirely. (R. 1223.)

SPECIFICATION OF ERRORS.

Specification No. 1.

The Court erred in denying appellant's motion for a judgment of acquittal made at the conclusion of all the evidence in the case. (R. 1234, 1319.)

Specification No. 2.

The evidence was insufficient to support the verdict of guilty on count one of the indictment.

Specification No. 3.

The evidence was insufficient to support the verdict of guilty on count two of the indictment.

Specification No. 4.

The evidence was insufficient to support the verdict of guilty on count three of the indictment.

Specification No. 5.

The evidence was insufficient to support the verdict of guilty on count four of the indictment.

Specification No. 6.

The Court erred in permitting the witness Charles R. Ringo to testify as a witness for the Government over

the objection of appellant that the relationship of attorney and client existed between the appellant.

The full substance of the testimony of Charles R. Ringo is set forth in the preceding statement of the case.

When the witness Ringo was first called by the Government appellant objected to the witness testifying on the ground that he was an attorney at law and the appellant was his client. (R. 112.) Ringo testified that he was a certified public accountant and an attorney at law admitted to practice in the California Courts. (R. 112-3.) That he was associated with the accounting firm of D. A. Sargent & Co., that in 1948 appellant came to the firm of Sargent & Co. and saw Ringo; that appellant first saw Mr. Sargent who turned him over to Ringo (R. 114); that as a result Ringo was requested to make out a net worth statement—to try and work out a comparative net worth statement—1942 through 1947 (R. 115); (here the witness produced his business card reading as follows: "Charles R. Ringo, CPA, Attorney-at-law, D. A. Sargent & Company, certified public accountants, 1212 Broadway, Oakland, California". (R. 116); when Mr. Olender first talked to me he asked me if I was an attorney-at-law, and that he wanted an attorney-at-law who knew something about accounting; I told him I was and that I knew something about both subjects and he then retained me. (R. 116.)

Appellant again objected to the witness testifying "to any disclosure by this witness as to any affairs that he conducted or handled for defendant on the grounds of privilege" (R. 117), the Court overruled the objection. (R. 117.)

Ringo further testified that he was a specialist in tax matters and handled the legal accounting end of tax matters; that Mr. Olender hired him to look into his tax problems, whereupon the Court stated:

> "The Court. The witness may testify under the circumstances. His testimony is to be limited to accounting matters. And if there be any matters involving the relationship of attorney and client, I will rule on those matters as and when they appear." (R. 118.)

MILTON OLENDER, the appellant, testified as to this matter as follows:

When I learned that the United States was questioning my income tax declarations I went to Mr. Reinhard my banker and personal advisor and told him I wanted to get an accountant and a tax attorney. I did not want two men. (R. 423.) I wanted a combination of the two in one man. He said he knew such a man, that the firm of D. A. Sargent & Co. had a tax attorney and accountant as a partner of Mr. Sargent. (R. 424.) As I entered the door of the firm of D. A. Sargent, I read on the door: "D. A. Sargent" and underneath that "Charles R. Ringo, CPA, attorney-at-law." I talked to Mr. Sargent and told him the type of person I wanted and I never again spoke to Mr. Sargent. (R. 424.) Mr. Ringo came to my store and I explained to him just exactly what I wanted. I told him: "Mr. Ringo, I understand you are an attonrey as well as an accountant, and as such I have certain information that I would like to give to you." (R. 425.) I then retained Mr. Ringo and carried on with him all my tax matters. The particular reason

why I wanted an attorney and accountant combined in one man was that in my net worth statement there are many items concerning my mother, who was 70 years old and not in good health, and I didn't want many of those items disclosed. (R. 426.)

S. E. REINHARD testified:

I am connected with the Bank of America in Oakland, I have known Milton Olender about 20 years (R. 311); I have counselled with him in various business transactions and have acted as his banker. About 1948 Olender told me he was having some difficulty with the Treasury Department; I suggest that he go to the firm of accountants in our building known as D. A. Sargent & Company and that one of the partners, Mr. Ringo, was a tax attorney. (R. 312-313.)

At the conclusion of the evidence appellant moved the Court for an order declaring a mistrial for the error in admitting the testimony of the witness Ringo (R. 1231), this motion was denied.

Specification No. 7.

The Court erred in sustaining an objection by the Government to the following question propounded to the witness Charles R. Ringo by appellant:

> "Q. And at that time the relationship of attorney and client was set up?
>
> Mr. Drewes. Well, I submit—I object to that, your Honor, as calling for the opinion and conclusion of the witness.
>
> The Court. Sustained." (R. 116-7.)

Specification No. 8.

The Court erred in admitting in evidence over the objection of appellant, United States Exhibit No. 45.

During the examination of Melbourne C. Whiteside, a government witness, the following took place:

> "Q. Mr. Whiteside, in response to question asked by counsel you stated that Mr. Ringo had propounded questions to the defendant, one of which—the response to one of which set forth the amount of cash that the defendant had had in his bank vault at certain dates, is that correct?
>
> A. That's correct.
>
> Q. And was that shown to you by Mr. Ringo?
>
> A. That is correct.
>
> Q. I will show you, Mr. Whiteside, a photostatic copy of a document and I will ask you if that is a copy of the statement, in questions and answers, that was shown to you by Mr. Ringo and to which you have referred in your testimony?
>
> A. Yes, sir, that is the statement.
>
> Q. Do you know where the original is?
>
> A. No, I do not.
>
> Q. Was the original ever given to you?
>
> A. It was loaned to me but Mr. Ringo took it back and——
>
> Q. You gave it back to Mr. Ringo?
>
> A. That is correct.
>
> Mr. Drewes. If your honor please, the Government will offer the photostatic copy of the identified document in evidence, limited strictly to the item refered to as item 19 'Analysis of use of cash in Vault'.
>
> Mr. Lewis. Your honor, I object to that document going into evidence. He has identified it as coming

from Mr. Ringo. He has not identified any part of that document as coming from Mr. Olender.

*   *   *   *   *   *   *

Mr. Lewis. Your Honor, a further objection to it, it is a confidential communication. We note our objection to all this testimony.

*   *   *   *   *   *   *

Mr. Hagerty. And a further defect, your Honor, that it is purely hearsay, that is a hearsay document, and it has not been identified by the original writer, Mr. Ringo.

The Court. Overruled." (R. 250-252.)

The document, limited to Item 19, was admitted as U. S. Exhibit 45. Item 19 reads as follows: "Analysis of Cash in Vault—Decrease in 1944, $6,000; Decrease in 1944 (Goodman deal 20550), $19,000; Decrease in 1945, $42,800; Decrease in 1946, $7,200; Total $75,000.

Specification No. 9.

The Court erred in admitting in evidence over the objection of appellant the following portion of the testimony of the witness Melbourne C. Whiteside, called and examined by the Government:

"Q. Now, Mr. Whiteside, as a result of your checking the bank records in Fresno here in evidence and as a result of your discussions with Mrs. Mollie Olender, I will ask you whether or not, for the purposes of your report, you made a determination as to whether the six items represent gifts which were made by Milton Olender—strike that—which were made by Mrs. Mollie Olender to her son Milton?

Mr. Hagerty. Will, if your Honor please, again we will enter an objection. The question is both leading and suggestive. It also is again calling for the conclusion and opinion of the witness, and partially based on hearsay.

The Court. Overruled.

A. Yes, we made a determination of that.

Q. (by Mr. Shelton). What was that determination?

Mr. Hagerty. We enter the same objection, your Honor.

The Court. Overruled.

A. Our determination was that the gifts were not in fact made." (R. 1102-3.)

Specification No. 10.

The Court erred in admitting in evidence over the objection of appellant, United States Exhibit No. 55.

The Government, in rebuttal, called one Donald A. Jensen as a witness, who identified himself as the director of the Fresno County Department of Public Welfare; he identified a file of papers as being the official records of his department and as being the file of one Laura J. Foote for an old age security pension, containing, among other documents, an affidavit of Betty Olender the wife of appellant. Appellant objected to the introduction into evidence of the file, which objection was overruled by the Court. (R. 1126.)

As the proceedings, objections and description of the documents are quite lengthy, we set forth the same in the Appendix hereto at page 1.

Specification No. 11.

The Court erred in instructing the jury as follows:

> "You are further instructed that when in the trial on charges of income tax evasion discrepancies between the defendant's return and his actual income are indicated by the Government's proof, the failure of the defendant to offer explanation in any form may be considered by you in arriving at your verdict." (R. 1392.)

To which instruction the appellant duly excepted. (R. 1401.)

ARGUMENT.

1. THE COURT ERRED IN ADMITTING IN EVIDENCE, OVER APPELLANT'S OBJECTION, U.S. EXHIBIT NO. 55.

Specification of Error No. 10.

The Government, in rebuttal, called the director of the Fresno County Department of Public Welfare who identified a file of papers as being the records of the application and proceedings of Laura J. Foote for Old Age Security payments from the State of California. (R. 1126.) The avowed purpose of the Government in offering these documents was stated by the prosecutor as follows:

> "Mr. Drewes. I will make a statement. There are in these files a number of form replies from various banks, your Honor, public welfare, Fresno, the earliest one is 1939 through 1942, by which we seek to establish that Laura Foote had no cash in banks over that period of time. You will recall defendant's testimony that he received $2,500 from Mrs. Foote which she had saved over a long period of time. There are

also a number of reports reflecting much the same thing, which are filled out by the various investigators, as I take it, social workers from that department, in which successive dates are shown the assets of Mrs. Foote. It goes to the same point. And there is finally the affidavit of Mrs. Betty Olender, which is dated in May of 1939, in which she states that she has no cash in banks and no cash in—I think specifically in safe deposit boxes.

Your Honor will doubtlessly recall the defendant also testified that the gifts made over the ten-year period were made to himself and to his wife jointly. That, of course, goes to impeach that testimony. There is the purpose of the showing." (R. 1121-22.)

Appellant objected to the offer on the grounds that the documents were hearsay, an attempt to impeach appellant's testimony on collateral issues; that the whole scope of the documents were not within the issues framed by the indictment which covered 1945 and 1946 (R. 1126), which objection the Court overruled.

The entire matter with a description of each document is set forth in full under our Specification of Error No. 10. (See Appendix, p. 1.)

Summarized these documents are as follows: (a) Affidavit of Betty Olender, appellant's wife, dated May 23, 1939, stating that she has no cash on hand, no money in bank, no postal savings, no funds in safe deposit boxes, no stocks, bonds or securities, no salary (R. 1137); (b) six reports of investigators for the Welfare Department; (c) five reports from banks relative to lack of deposits, etc., of Laura Foote; (d) three or more statements or

affidavits of Laura Foote showing no personal property in excess of $500.

Repeatedly throughout the trial it was stated by the judge and counsel that the question of many of appellant's assets resolved into a question of veracity on the part of appellant. (R. 397, 541, 620, 628, 629, 1201, 1246.) At page 1246 the Court states:

> "* * * and we come back to my original premise and my original thinking in this case, the beginning and the ending of the case is the credibility of the defendant."

The government prosecutor made valiant use of these documents, to the great prejudice of appellant. The prosecutor at the beginning of his opening argument stated to the jury:

> "In this particular case, the record is such, I believe, that it comes down to this, if you believe the defendant's explanation of these various complicated transactions, then, of course, he had no intent, and by his calculations there is no substantial understatement of income." (R. 1252.)

The prosecutor used Betty Olender's affidavit to refute the fact that appellant had received money gifts from his father (R. 1267); the Welfare file to prove that Mrs. Foote did not have the $2500 to give appellant (1306, 1316); again refers to Betty Olender's affidavit as refutation of gifts to appellant from his father (R. 1316); Mrs. Olender's affidavit again used (R. 1370) etc.

Clearly, if the jury found that appellant was testifying falsely as to the gifts from his father, the $2500 from

Mrs. Foote, that he did not have large sums in his safe deposit box, and based these findings on the Welfare file of Mrs. Foote, the jury most probably disbelieved any other testimony given by appellant.

That Mrs. Foote's Welfare file was the rankest of hearsay is easily demonstrated.

Betty Olender's affidavit was not only hearsay, but constituted a violation of the law which prohibits a wife from testifying against her husband in a criminal case.

The entire file was incompetent as evidence under the law of California which makes such documents confidential and prohibits their disclosure except in a case dealing directly with a particular Old Age Security payment.

The entire matter deprived appellant of the right of cross-examination.

The file included six reports of investigators of the Welfare Department, reports from various banks and the filed statements of Laura Foote. No one of these persons was called as a witness. No right of cross-examination was accorded appellant. The very rule that prohibits hearsay testimony is based on the proposition that it deprives the accused of the right of cross-examination.

> "The exclusion of hearsay evidence is based upon the principle that every litigant who comes into a court of justice has a clear right to have the witness against him brought into court face to face, so that he may be tested by cross-examination as to every fact concerning which he has given evidence."
>
> *San Francisco Teaming Co. v. Gray,* 11 Cal. App. 314, 317, 104 Pac. 999.

Yet these hearsay reports were used to prove that Mrs. Foote was practically penniless and, therefore, appellant was a liar.

A wife cannot testify against her husband in a criminal case. The Government could not do indirectly that which the law prohibited it from doing directly. As the Government could not call Betty Olender to testify against appellant, it could not indirectly do this by putting into evidence the hearsay affidavit of appellant's wife made in 1939—five years before the offense charged in the indictment. Betty Olender was not on trial.

There was no evidence establishing that appellant knew aught of his wife's affidavit, it was hearsay and inadmissible.

The entire file was incompetent as evidence under the law of California.

Section 118, *California Welfare and Institutions Code,* at time of trial, provided in part as follows:

> "*(Applications and records confidential.)* Except as otherwise provided in this section, all applications and records concerning any individual made or kept by any public officer or agency in connection with the administration of any provision of this code relating to any form of public assistance for which grants in aid are received by this State from the United States Government shall be confidential, and shall not be open to examination for any purpose not directly connected with the administration of such provision of this code.
>
> *(Unofficial disclosure as misdemeanor.)* Except as otherwise provided in this section, no person shall

publish or disclose or permit or cause to be published or disclosed any list of persons receiving any such public assistance. Except for purposes directly connected with the administration of such public assistance, no person shall publish, disclose, or use or permit or cause to be published, disclosed, or used any confidential information pertaining to an applicant or recipient. Any violation of this section is a misdemeanor. * * *"

A comparable situation was presented in the case of *United States v. Caserta* (3 Cir.), 199 F. (2d) 905, 910, where defendant objected to the introduction in evidence of his Selective Service questionnaire by the Government, the Circuit Court held as follows:

"The questionnaire involved here contained at the bottom a statement to the effect that the information was confidential except for certain specified uses by the government. We think it is a matter of importance that this assurance to registrants that the information they give is to be treated as confidential should be kept in good faith unless the registrant, himself, consents to its disclosure. It has been uniformly held that a third party cannot compel the production of these questionnaires unless the registrant consents. Now it is true that there is a regulation which permits the disclosure and examination of such information to the employees of the local board, medical advisory board and so on ending up with the phrase 'proper representatives of the state director of selective service or the director of selective service, United States attorneys and their duly authorized representatives.' 32 Code Fed. Reg. §605.32 (1943), as amended, §1606.32(a)(4) (Rev. 1951).

It is argued from this that since the United States attorney may read a registrant's questionnaire he may introduce it in evidence in a trial in which the United States is the prosecutor. If this were a case involving alleged violation of selective service law we might be forced to accept the argument. The same would be true if a man were being prosecuted for perjury for false statements in his questionnaire. See 32 Code Fed. Reg. §1606.35(a). But this case does not involve either one. It is a trial on an entirely separate matter. Just because the United States attorney can look at a piece of paper and get information from it certainly does not mean that he may bring it into court and show it to a jury in any criminal case. We think it may prove highly injurious to the operation of the selective service system if a registrant's confidential information is to be spread far and wide at the wish of local prosecutors. The admission of the questionnaire in this case was error."

In the *Caserta* case the Court assumed that the questionnaire would have been otherwise competent. Here, we have demonstrated that the entire file was incompetent for reasons wholly outside the foregoing code section; it was hearsay and, in part, violated the law that prohibits a wife from testifying against her husband.

2. THE COURT ERRED IN PERMITTING GOVERNMENT WITNESS WHITESIDE TO TESTIFY, OVER APPELLANT'S OBJECTION, TO HIS OPINION AND DETERMINATION THAT APPELLANT'S MOTHER HAD NEVER MADE CERTAIN GIFTS OF MONEY TO APPELLANT.

Specification of Error No. 9.

Appellant had testified that his mother had made six gifts of money to him during her lifetime. In rebuttal the Government called Melbourne C. Whiteside and propounded to him the following question:

> "Q. Now, Mr. Whiteside, as a result of your checking the bank records in Fresno here in evidence and as a result of *your discussions with Mrs. Mollie Olender,* I will ask you whether or not, for the purposes of your report, you made a determination as to whether the six items represent gifts which were made by Milton Olender—strike that—which were made by Mrs. Mollie Olender to her son Milton?" (R. 1102.)

Appellant objected to the foregoing question on the ground, among others, that "It is again calling for the conclusion and opinion of the witness, and partially based on hearsay." The Court overruled the objection and the witness answered: "Our determination was that the gifts were not in fact made." (R. 1103.)

Just prior to being asked the foregoing question Mr. Whiteside had testified that he spoke to Mrs. Mollie Olender twice in 1948 (R. 1102); but the conversations were not given, as indeed they could not be because such testimony would be hearsay. Yet, despite the fact that the conversations between the witness and Mrs. Olender would be hearsay, the Court permitted the witness to give his opinion and conclusion based in part on such undisclosed hearsay.

Mr. Whiteside had identified himself as a "Special Agent in the Intelligence Division of the Internal Revenue" (R. 234), and he was so held out to the jury by the prosecution. The jurors were most apt to listen with respect to testimony coming from such a witness' mouth, and to pay great heed to his opinions and determinations. Whether appellant's mother had made substantial cash gifts to appellant was one of the important issues in the case, and to allow such a witness to give an opinion based partly on hearsay testimony was most damaging to appellant.

Furthermore, it is the general rule that no witness, lay or expert, can give his opinion on one of the main, ultimate facts to be decided by the jury. (32 *C.J.S.* p. 74, sec. 446; *United States v. Stephens,* 73 F. (2d) 695, 702.)

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3. THE COURT ERRED IN ADMITTING IN EVIDENCE OVER THE OBJECTION OF APPELLANT, U.S. EXHIBIT NO. 45.

Specification of Error No. 8.

During the examination of Melbourne C. Whiteside, called by the Government, he testified that Mr. Ringo had told him that he, Ringo, had propounded questions to the defendant who had given Ringo a statement showing the cash on hand as of the beginning of the period and how it was dispersed. Thereupon the Government showed Whiteside a photostatic copy of a document and asked him if that is a copy of the statement in questions and answers that Ringo had showed him. The witness did not have the original of the document. Thereupon the Government offered Item 19 of the document in evidence to which appellant's counsel objected on the ground that the wit-

ness had only identified it as a document coming from Mr. Ringo and had not identified any part of that document as coming from Mr. Olender and that it was a confidential communication. The Court overruled the objection. (R. 250-252.)

Item 19 is entitled "Analysis of Cash in Vault" and then contains the following items:

Decrease in 1944	$ 6,000.00
Decrease in 1944 (Goodman deal 20550)	19,000.00
Decrease in 1945	42,800.00
Decrease in 1946	7,200.00
Total	$75,000.00

The Government contended that appellant only had $50,000 in his vault as of December 31, 1944 while appellant contended he had over $72,000. The foregoing figures were used by the Government in argument to the jury to support the Government's claim of only $50,000 being in the vault. (R. 1267, 1268.)

When Ringo was called as a Government witness he did not identify this Exhibit No. 45 or produce the original. Although the Government, when it offered the same in evidence, erroneously stated to the Court that Mr. Ringo's testimony had identified it. (R. 251.)

It should be manifest that the document was hearsay and that no proper foundation had ever been laid for its introduction into evidence. It was used with most damaging effect by the Government. It was also a privileged communication as will be demonstrated under our argument relating to the error in admitting any of the testimony of the witness Ringo.

4. THE COURT ERRED IN ADMITTING THE WITNESS CHARLES R. RINGO TO TESTIFY OVER THE OBJECTION OF APPELLANT.

Specification of Error No. 6.

When the Government first called Mr. Ringo as a witness, appellant objected to his testifying on the ground that the relationship of attorney and client existed between appellant and the witness. (R. 112.) Mr. Ringo testified that he was a certified public accountant and an attorney-at-law, admitted to practice in the California Courts (R. 112); that after appellant had come to the accounting firm of Sargent & Company, Mr. Ringo took over his affairs (R. 115); that Ringo's business card read in part as follows: Charles R. Ringo, C.P.A., Attorney-at-Law (R. 116); that Olender first asked him if he was an attorney-at-law and said he wanted an attorney-at-law who knew something about accounting; that after he had told appellant that he was an attorney and knew both subjects, law and accounting, *that appellant retained him.* (R. 116.) Ringo further testified he was a specialist in tax matters and handled the legal accounting end of tax matters, that he was employed to look into Olender's tax problems. (R. 118.)

MILTON OLENDER, the appellant, testified that when he learned the Government was questioning his returns, that he went to his banker, Mr. Reinhard, and told him he wanted to get an accountant and tax attorney; that he did not want two men but wanted the combination of two in one man (R. 423); that Mr. Reinhard said he knew such a man and referred him to the Sargent firm, of which one member was a tax attorney and an accountant (R. 424); that when he entered the door of the Sargent

firm, that there appeared on the door the following: Charles R. Ringo, C.P.A. Attorney-at-Law; that he talked to Mr. Sargent and told him the type of person he wanted; that Ringo came to his store and he told Ringo that he understood he was an attorney as well as an accountant and as such he had certain information that he desired to give to him (R. 425); that he then retained Mr. Ringo and carried on with him all of his tax matters; that the reason he wanted an attorney and an accountant combined, that in his net worth statements there were many items that he didn't wish disclosed. (R. 426.)

Mr. Reinhard testified that in 1948 he suggested that appellant go to the Sargent firm and that one of the partners, Mr. Ringo, was a tax attorney. (R. 312-13.)

It should be apparent from the foregoing that the relationship of attorney and client existed between Ringo and appellant. Appellant was particular in the kind of man he hired; he wished to procure an attorney-at-law and retained Mr. Ringo on the express understanding that there were confidential matters he was not to disclose.

The trial judge overruled the objections on the ground that his testimony was to be limited to accounting matters (R. 118) but it cannot be made to appear how Ringo's testimony as to the accounting could be segregated from the confidential information given to him by appellant.

It is true that Olender submitted to the Internal Revenue Department, U. S. Exhibit No. 24 entitled "Comparative net worth Statement" but the submission of this document to the Government at the Government's request

did not open the doors for Attorney Ringo to testify to any conversations or to any written statements made to him by Olender. An examination of the record shows that the Court's ruling was based upon the decision of this Court in the *Himmelfarb* case but that case lends no support to the ruling herein.

In *Himmelfarb v. United States,* 175 Fed. (2d) 924, 938, the situation presented was entirely different from the one at bar. In the *Himmelfarb* case the accountant was not an attorney-at-law; had never been employed as the defendant's attorney. He was called in at the request of defendant's attorney and was present at certain conversations held between defendant and his attorney. The Court held that under the circumstances disclosed by the record, the presence of the accountant was not necessary to the conference and that he did not occupy any different position than a stranger who was present and overheard the conversation between defendant and his attorney.

In the *Himmelfarb* case, this Court, at page 939, holds that if defendant had told certain privileged matters to his lawyer and the lawyer had breached this confidence by telling them to the accountant, that the accountant could not give testimony as to such matters. Here the attorney and accountant were one and the same person. Ringo as accountant could not disclose the information he acquired as an attorney.

In the instant case, Mr. Ringo was employed as an attorney and whatever communications were made to Mr. Ringo were privileged and confidential. To illustrate this, we again refer to U. S. Exhibits Nos. 26 and 45. It is on

these exhibits that the Government based its case, to-wit, that at the end of 1944 Olender only had $50,000 in his safe deposit box. Of course, Exhibit 45 was inadmissible as it had never been identified by Ringo. Let us assume, however, that Ringo had identified the document. It was not one submitted to the Government. It was a mere statement made by a client to his attorney, who as an attorney was advising him as to his tax problems.

The importance of this point cannot be overstated. Without the testimony of Ringo the Government had no case.

In *City & County of San Fransico v. Superior Court*, 37 Cal. (2d) 227, 231 P. (2d) 26, Hession, the plaintiff, brought action for personal injuries; his attorneys employed a Dr. Catton to make an examination of plaintiff; defendant took Dr. Catton's deposition wherein he testified that he was the employee and agent of plaintiff's lawyers and refused to divulge the results of his examinations. Hession's attorneys contended that the results of the doctor's examinations were privileged under the attorney-client relationship. The California Supreme Court upheld this latter contention in a lengthy opinion running from page 234 to 238 of the California report. Among other things the Court stated:

> "The privilege embraces not only oral or written statements but actions, signs, or other means of communicating information by a client to his attorney. (cases). 'Almost any act, done by the client in the sight of the attorney and during the consultation, may conceivably be done by the client as the subject of a communication, and the only question will be

whether, in the circumstances of the case, it was intended to be done as such. The client, supposedly, may make a specimen of his handwriting for the attorney's information, or may exhibit an identifying scar, or may show a secret token. If any of these acts are done as part of a communication to the attorney, and if further the communication is intended to be confidential * * *, the privilege comes into play.' (8 Wigmore, *supra,* § 2306, p. 590.)"

Shortly following the foregoing the Court states:

"Had Hession himself described his condition to his attorneys there could be no doubt that the communication would be privileged and that neither the attorney nor Hession could be compelled to reveal it, even though a client is not listed in section 1881 (2) among those who cannot be examined. (cases) It is no less the client's communication to the attorney when it is given by the client to an agent for transmission to the attorney, and it is immaterial whether the agent is the agent of the attorney, the client, or both."

On the following page the Supreme Court's opinion holds:

"Thus, when communication by a client to his attorney regarding his physical or mental condition requires the assistance of a physician to interpret the client's condition to the attorney, the client may submit to an examination by the physician without fear that the latter will be compelled to reveal the information disclosed. (cases)."

See also *In re Ochese*, 38 Cal. (2d) 230, 238 Pac. (2d) 561.

So here, when Olender employed and retained Ringo as his attorney it was necessary that Ringo, in order to properly understand and handle Olender's tax problems, for which Ringo testified he was hired (R. 118), be advised of all business transactions, assets, liabilities, etc. of Olender. If Olender had retained independent counsel who in turn hired Ringo to advise them of Olender's affairs after examining Olender and his records, the things disclosed by Olender to Ringo would have been confidential and privileged. No different result can be arrived at merely because Ringo was Olender's attorney and also an accountant.

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5. THE COURT ERRED IN SUSTAINING THE GOVERNMENT'S OBJECTION TO THE QUESTION ASKED OF THE WITNESS RINGO AS TO WHETHER THE RELATIONSHIP OF ATTORNEY AND CLIENT EXISTED BETWEEN HIM AND APPELLANT.

Specification of Error No. 7.

After Charles R. Ringo had been called by the Government and appellant had objected to his testimony on the ground of the relationship of attorney and client, the Court permitted appellant's attorney to examine Mr. Ringo. Ringo then testified that when he first talked to Mr. Olender, Olender told him he wanted an attorney at law who knew something about accounting and, after he told Olender he knew both subjects, that Olender retained him. Thereupon appellant's counsel asked the following question: "And at that time the relationship of attorney and client was set up?" (R. 116.) The Government objected on the ground that it called for the witness' opin-

ion and conclusion and the Court sustained the objection. (R. 117.) The question of whether the relationship of attorney and client existed between Ringo and appellant was a most important one.

In the case of *Collette v. Sarrasin,* 184 Cal. 283, 289, 193 Pac. 571, the California Supreme Court states as follows:

> "It is proper to ask the attorney whether or not with relation to the transaction under inquiry he was acting as the attorney for the person making the statements. If either of the parties are not satisfied with the answer of the witness, the dissatisfied party can ask such questions as are essential to enable the court to determine whether or not the relationship existed."

The question was proper, material and pertinent to the issue involved and it was error on the part of the Court not to allow the witness to answer the same.

6. THE COURT ERRED IN ITS INSTRUCTIONS TO THE JURY.

Specification of Error No. 11.

The Court gave the following instruction to the jury:

> "You are further instructed that when in the trial on charges of income tax evasion discrepancies between the defendant's return and his actual income are indicated by the Government's proof, the failure of the defendant to offer explanation in any form may be considered by you in arriving at your verdict." (R. 1392.)

To which instruction the appellant duly excepted. (R. 1401.)

As we understand the law the burden of proof was on the Government to establish the charge to a moral certainty and beyond a reasonable doubt. This burden carried with it proof of establishing the net worth of appellant at the beginning and end of the periods involved. (*United States v. Fenwick* (7 Cir.), 177 Fed. (2d) 488.) A mere reading of the foregoing instruction discloses that it shifted the burden of proof to the defendant and this cannot be done in a criminal case.

Furthermore, the instruction does not deal with the weight of any evidence offered on behalf of the Government but states that if the Government's proof *merely indicates some discrepancies* between the Returns filed by appellant and his actual income, that the burden is then on the defendant to explain away these discrepancies and a failure to do so is a factor that the jury have a right to consider in returning their verdict. Such is not and cannot be the law.

The burden of proof never shifts from the prosecution to the defense.

> "A prima facie case is unknown in criminal procedure. In no condition of proof is it permissible to instruct a jury that it had become the duty of defendant to establish his innocence to obtain an acquittal."
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> *Ezzard v. United States*, 7 F. (2d) 808, 811.

7. THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CHARGE.

Specification of Errors Nos. 1, 2, 3, 4 and 5.

As pointed out in the opening pages of this brief and as conceded by the Government (R. 1357), the three main issues in the case were whether appellant had only $50,000 and not $72,000 at the beginning of the basic net worth period; whether appellant's beginning net worth period should have the additional credit of $20,550 as the result of the Goodman suit transaction and whether the $20,000 in bonds, which the Government contended were appellant's, in fact belonged to appellant's mother.

In the lower Court the case was argued to the jury by the prosecutor mainly on the theory that defendant's evidence in the foregoing regards could not be believed. However, the burden was on the Government to establish appellant's net worth as of December 31, 1944, 1945 and 1946. (*United States v. Fenwick* (7 Cir.), 1777 Fed. (2d) 488, 491; *Brodella v. United States* (6 Cir.), 184 Fed. (2d) 823; *Bryan v. United States* (5 Cir.), 175 Fed. (2d) 223, 225.)

We are aware of the language of this Court in *Remmer v. United States* (decided May 28, 1953) in which the "vitality" of the *Fenwick* case is questioned and the dissenting opinion in the *Bryan* case is looked upon with favor and where this Court in the *Remmer* case states:

> "The evidence is sufficient if the jury is justified in finding therefrom, beyond a reasonable doubt, that there has been a wilful attempt to evade taxes."

Assuming that this Court is correct in holding that the *Fenwick* and *Bryan* cases too narrowly limited the

function of the jury in prosecutions based on the net worth method, nevertheless the burden was still on the Government to prove even an "approximation" of appellant's net worth to that degree of certainty required by law. The Government could not carry its burden of proof merely by throwing a mass of figures at the jury and asking the jury to surmise or conjecture from such mass that appellant had unreported income.

With these general thoughts in mind let us turn to the three foregoing items, following which we will discuss the two or three minor items specified in the opening portions of this brief.

Did appellant have $50,000 or $72,000 in his safe deposit box on December 31, 1944?

The Government contended that at the beginning of the net worth period appellant only had $50,000 in his safe deposit box. This assumption and the facts on which it was based is testified to by the Government witnesses Mytinger and Whiteside as follows:

Mytinger testified that his computations as to appellant's net worth were based on the items contained in the stipulation (U. S. Exhibit 15) and that in respect to the cash in the safe deposit box, his computations were based on U. S. Exhibits 25 and 45; also on U. S. Exhibit 24. (R. 268.)[16]

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[16]Exhibit 24 is the first sheet of the Comparative Net Worth Statement made by Mr. Ringo. This merely shows appellant's net worth as of December 31, 1941 and December 31, 1947. Exhibit 25 is the Government's computation as of December 31, 1941 and December 31, 1947. This exhibit credits Olender with $75,000 in the safe deposit box or vault on December 31, 1941. There is no statement in there as to Olender's net worth on December 31, 1944.

Exhibit 45 on which the witness relied is the document that we claim was erroneously admitted in evidence under our Specification of Error No. 8. If this document was erroneously admitted in evidence as we contend, then the Government had no basis on which to claim that Olender only had $50,000 in his safe deposit box.

Mytinger further testified that in computing defendant's net worth at the end of December, 1944 he used cash in the safe deposit box at $50,000. (R. 277.)

Mytinger further testified that he never verified any single item constituting the basis on which he based his calculations (R. 1072) but that he merely relied on the work done by Revenue Agents Root and Whiteside.

Whiteside testified for the Government that he had the affidavit of Monroe Friedman before him but that in computing the cash on hand the Government only allowed the amount as claimed by the taxpayer and that he got that information through Mr. Ringo. (U. S. Exhibit 45.) (R. 247.) Further on Whiteside testified that their starting point on the net worth was the sworn net worth statement submitted by Mr. Olender and that as a breakdown of the cash involved they used the information they had obtained from Mr. Ringo. (R. 1174.)[17]

The affidavit of Monroe Friedman (admitted by stipulation) (R. 323) that on April 22, 1944 he counted the cash in appellant's safe deposit box and that there was over $70,000 in the box; that on May 5, 1944 he again counted the cash and the same amount of money was there.

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[17]Later on we will point out that the Government admitted certain errors in their computations which were in favor of appellant.

The Government conceded that the affidavit of Judge Friedman was correct and that there was over $70,000 in appellant's safe deposit box in May of 1944 (R. 1263, 1359), but the Government on the last two pages of the record, while conceding the amount in May of 1944, denied that such amount was there on December 31, 1944. This poses the natural query: what became of the 22,000 odd dollars? If it was used in the purchase of other matters and things still in the possession of appellant at the end of December, then his net worth would be increased by this amount over the amount contended for by the Government. If the money was still in the safe deposit box, a like result would follow. In either event the Government's computation of appellant's net worth at the end of 1944 was shy $22,000.

There is much evidence in the record as to how appellant acquired this money. He was subjected to long examination and cross-examination in this regard, all of which has become immaterial in view of the Government's concession that the affidavit of Judge Friedman was true and correct. It should further be remembered that Mr. Olender testified that before Judge Friedman went to the safe deposit box in April, Olender had withdrawn $5,000 to $10,000 therefrom to use on his trip to Texas (R. 375); that this money was not used.

The Government also relied on U. S. Exhibit No. 26 which document it had received from the witness Ringo. Ringo testified that when he first started in with the case he asked Olender to bring him estimates of his assets and liabilities; that he brought them to him; that Exhibit 26 was a summary of the items in Ringo's hand-

writing that Olender brought to him; that Olender took back the original but the information on the document was that which he had acquired from Olender (R. 134); that the document was entitled "M. Olender, comparative balance sheets 1941, 1946." This document contained an item of cash in vault as of December 31, 1944 of $50,000. (R. 136.)[18]

Ringo further testified that Exhibit 26 was not intended by any means to be a full, final and complete study. (R. 149.)

These Exhibits 26 and 45 were prepared by Olender as mere estimates in 1948 of his condition as of December, 1944. When Mr. Hellman was called as a witness for the defendant he referred to Defendant's Exhibit AK, Schedule 4 as an itemization and tracing of the funds that went in and out of Olender's safe deposit box, beginning with the account of this cash by Judge Monroe Friedman.

Olender testified that during the years 1944, 1945 and 1946 his assets and sources of income came from the Army and Navy store, income from his rental property in Fresno, income from stocks and bonds, gifts, the money entrusted to him by Mrs. Foote and the money in his safe deposit box; that if he dealt in any cash transactions during this period, the cash would either have to come from his bank accounts or from his safe deposit box. (R. 752.)

There is no evidence in the record that Olender had any other sources of cash or income. Yet, despite this

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[18]We have heretofore argued that all testimony of Ringo relative to communications made to him by Olender were incompetent under the attorney-client relationship rule.

fact, the Government erroneously argued to the jury that some of the amounts shown on said Schedule 4 of Defendant's Exhibit AK could have been unreported withdrawals from his business (R. 1270); that in the prosecutor's opinion Levy, Olender and Lerman were all involved in the illicit trading in sailor suits in violation of Government regulations; that they were dealing in the black market. (R. 1288.) In his closing argument the prosecutor again harangued the jury with the proposition that Olender was engaged in black market trafficking of sailor suits. (R. 1366.) All this without one word of testimony in the record to show that Olender was engaged in any illegal or illicit transactions.

When Roland D. Hellman was called as a witness for appellant, he explained Schedule 4 of Defendant's Exhibit AK in full (R. 895, 1223) together with the sources of information he acquired in making up the schedule. (R. 893-902.)

Every receipt and disbursement of Olender as outlined in the evidence is thus accounted for by the defense. There is no evidence to refute the foregoing facts, nor to base the inference or surmise or conjecture upon that Olender was receiving any illicit profits from any source. The purport of said Schedule 4 and the evidence relating thereto establishes that every expenditure and transaction made by Olender as a cash transaction could only have come out of the cash he had in his safe deposit vault. It follows that the basic net worth period relied on by the Government understated Olender's net worth by the sum of at least $22,000.

Who owned the $20,000 in bonds?

Mytinger testified for the Government that in his computations for 1945 of the Treasury Bonds amounting to $82,000, he included in that sum $20,000 worth of bonds that Mr. Ringo had testified belonged to appellant's mother. (R. 278.)

Lawyer-accountant Ringo testified for the Government that he examined the items in defendant's safe deposit box and asked Olender how he had acquired them (R. 128); that he made an inventory of the contents of the box (R. 137) and that he had a memorandum showing that the bonds were held for appellant's mother, 2¼% Treasury Bonds listed as $20,000 worth. (R. 137.)

Appellant testified that in 1944 his mother came to stay at his home and she brought with her $20,000 in currency; that they opened a safe deposit box and put the money in the box (R. 366); that as a result of certain communications from his mother he subsequently invested that money in Government Bonds; that he first recommended that she invest the money in Bank of America stock (R. 367); that following correspondence with his mother, he made investments for her by the purchasing of Treasury Bearer Bonds and he placed them in the safe deposit box. (R. 531.) There is no evidence in the record contradicting the foregoing. The bonds were in the safe deposit box earmarked as belonging to appellant's mother and appellant testifies to such fact.

The only evidence on which the Government relied to refute the foregoing was that in 1947 appellant had

given Mr. Ringo some data for the preparation of his 1947 and 1948 tax returns; that for 1947 he reported interest paid as being $1225 and for the year 1948, $775. (R. 163-4.) Ringo testified that interest at 2¼% on $20,000 would equal $450 which was the differential between the two amounts of interest reported. (R. 164.) The entry of $1225 on the 1947 list was in the handwriting of Ringo and not appellant. (R. 161.)

There is no evidence in the record to show that any interest on these bonds of $20,000 was ever included in appellant's tax returns for years preceding 1947 or for years after 1947. If appellant used the interest in the year 1947 it was proper that he should include it in his return. Ringo did not know on what bonds this interest was paid; they were properly earmarked in the safe as the property of appellant's mother and the Court so understood the testimony. (R. 160.)

In view of the foregoing, the Government was in error in including these $20,000 worth of bonds among the assets of appellant and its computation of $82,000 should be reduced to $62,000.

The Goodman transaction adds an additional $20,550 to appellant's net worth.

In Defendant's Exhibit AL (see appendix), there is a chart explaining the entire transaction relative to the Goodman transaction as to the purchase of 822 sailor suits from Mr. Goodman. This chart shows the withdrawal of the money from the safe deposit box, what was done with the money and also what was done with the suits, how they were sold and the balance remaining

in the stock of appellant. Mr. Hellman explained this chart in full. (R. 586-593.) The truth of this transaction does not depend solely on the testimony of appellant but is corroborated by witnesses, cashier's checks, etc.

LOUIS LEVY, called by the Government, testified in substance that in 1944 he made arrangements with George Goodman by which he purchased about $20,000 worth of sailor suits for appellant (R. 195); that these suits were subsequently delivered to appellant, whereupon he complained to Levy that the sizes were not what he bought; that though the suits were marked as small sizes, they were in fact large sizes; that subsequently he disposed of 200 of these suits to Mr. Lerman because Lerman had a tailor who could cut down the suits (R. 196-7); that he sold other of these suits from Goodman for Olender totaling about $7,000, which latter sum he took to New York for the purpose of buying additional suits for Mr. Olender from a man named Saraga.

The Government established the purchase in 1944 of cashier's checks totaling $20,550, all payable to Goodman. (R. 1161-2.)

Olender testified that he did not directly enter into any transactions with George Goodman in New York but conducted the same through Mr. Levy; that as a result he drew $20,550 from his safe deposit box and made out cashier's checks payable to George Goodman (R. 387); that the uniforms received from Goodman were not reflected in his inventory as of January 1, 1945; that as of January 1, 1946, $8,000 of them were reflected and in

1947 $2,000 reflected in his inventory (R. 387); that the uniforms did not correspond with his order; that he had ordered uniforms of small size whereas the uniforms he received were all of large sizes; that he could not sell them as he didn't have a tailor who could cut them down (R. 398); that he complained to Levy; that Levy sold 200 of these suits for him at cost and he deposited the $5,000 in his store account; that in July or August of 1945 Levy disposed of about 280 suits for $7,000 and took that money to New York and gave it to Mr. Saraga as a deposit on suits which Saraga did not deliver and the funds were returned at a later date (R. 399); that there were 342 suits left after selling 200 to Lehrman and 280 which Levy disposed of; that of those 342 suits he had sold 20 in his store and put the money in his cash register; that at the end of the year 322 suits were included in his inventory. (R. 411.)

It is of importance to note that during the course of the trial, in proceedings before the judge out of the presence of the jury, the prosecutor called on Mr. Mytinger to explain the Government's position and Mr. Mytinger in response stated: "I believe there is no denying that it was $20,550 that went out in 1944. I think it has been assumed that it went out for sailor suits." (R. 627.)

Olender further testified that he did not deposit this $20,550 in his business account and then sent a business check to Mr. Goodman because he had no assurance he was going to get any suits at all and besides, *Mr. Goodman wanted cashier's checks;* that he didn't enter those

purchases on his books at that time because when the merchandise arrived it was unsatisfactory and he wanted to return it immediately (R. 476-7); that he didn't pick up the suits in his inventory at the beginning of 1945 because they were in an indefinite state and he just let them stay there waiting the outcome of Mr. Levy's transactions in trying to sell or dispose of them. (R. 484.)

The prosecutor attempted to wipe this entire transaction aside by arguing to the jury that the Goodman sales invoices were pure phoneys and that Levy, Olender and Lehrman were all engaging in black market activities. (R. 1288.)

In his closing argument the prosecutor stated that the entire Goodman transaction occurred in 1944; that Olender sold the suits and put the money back in the vault. (R. 1368.) The prosecutor made this latter statement despite the fact that Mr. Lehrman testified and his checks corroborated his testimony that in purchasing the 200 suits from Mr. Levy, it was done in May of 1945 and Levy testified that he sold the additional suits for appellant in 1945.

As these suits were purchased in 1944, were still in appellant's possession at the end of that year, they should properly have been included in his net worth statement, thereby increasing the amount of net worth, as of December 31, 1944, as computed by the Government, by the additional sum of $20,550.

The transactions with "Money Back Smith" and "Barney's".

These transactions relate to certain items in the written stipulation as to appellant's assets and liabilities. (U.S. Ex. 15, see appendix.) Thus the stipulation shows that on Dec. 31, 1944, the Army & Navy Store had in bank the sum of $19,881.55, after deducting outstanding checks, and accounts payable of $14,363.70; the latter figure including the total sum of $6903.02 owing to Barney's and Smith's.

The evidence established that the amount relating to Money Back Smith was $4,742.99 and Mr. Lorenzen, of that establishment produced the receipted invoices for this amount showing payment in 1944. (Def. Exhibits AM and AM-1.)

As to the Barney transaction, Olender testified that the two cashier's checks (Defendant's Exhibit Z) dated Dec. 12, 1944 for $1911.77 and one for $248.26, made out to Barney Clothes Shop, were mailed to Mr. Barney at his request. (R. 604.)

The check for $1911.77 cleared the Los Angeles Bank on Nov. 15, 1944 and the check for $248.26 cleared the Los Angeles Bank on Dec. 20, 1944. Each of these checks is endorsed by Barney's Clothes Shop. (R. 688-9.)

Vera Manger, appellant's part-time bookkeeper, testified that in Defendant's Exhibit J, the general journal, there is an entry under date of Feb. 28, 1945 to the effect that there is a debit to account payable and a credit to M. Olender investment account with an explanation to record cash payments covering purchases from Money Back Smith and Barney's Clothes Shop in the sum of

$6,932; that such entry was made because when she went to pay the check, she found that Olender had paid that out of his personal account so she then debited the accounts payable and credited his investment account. (R. 827.)

The prosecutor, in arguing to the jury admitted the Barney transaction, but denied the validity of the Money Back Smith transaction. (R. 1260.)

The result is apparent. As of Dec. 31, 1944, there is an overstatement of accounts payable of $6,903.02, which would increase his net worth by that amount; by so increasing his net worth as of Dec. 1944 there would be a decrease of his net worth as of Dec. 31, 1945.

Other errors in Government's net worth computations.

There are many other errors in the Government's computations. We will but briefly refer to one of them, as we believe that the foregoing is sufficient to establish that the computations are insufficient to meet the requirements of the law as to the certainty with which the prosecution must establish the appellant's net worth at the beginning and end of the net worth periods.

If the Government need only prove an "approximation" in this regard; then the defendant need only prove his case by an "approximation".

The Asturias stock transaction.

The evidence, as above outlined in the statement of the case, shows that Olender made two payments to the Asturias Corporation of $5,000 each. The Government contended that the second payment must be used in com-

puting appellant's net worth. However, the record establishes that Olender eventually received stock for this payment and that the stock was valueless.

Mr. Mytinger, the Government's witness, in reply to a question by the Court stated:

> "The Court. You made a distinction, at the outset of your testimony, between net worth and expenditures of a capital nature, did you not, wherein you stated that if the stock had no value in 1946, and it appeared that this gentleman invested $10,000 in the company, Asturias Company, notwithstanding, would you set it up in the net worth?
>
> The Witness. No, I would say if it had no value, your Honor, and if it were included in his net worth statement representing an investment it would then be allowed below as a loss on worthless stock." (R. 279.)

If, as the evidence establishes, the stock was worthless what change would be made in Olender's net worth by including the face value of the stock and then deducting the same amount as a loss? Under such circumstance neither the addition to or omission from the net worth statement would change the totals.

Summary.

Practically all the items used by both appellant and the Government are contained in the stipulation on file. (Ex. 15.) The Government's stand is set forth in Mr. Mytinger's testimony as follows: "The evidence relied upon with respect to a very few items is contained in the stipulation, Government's Exhibit 15." (R. 268.) That in addi-

tion thereto the Government's computations included the Asturias stock items, the cash in the safe deposit vault and non-deductible expenditures of accounts paid to I. Magnin and Co. and the Gray Shop. (R. 269.) These latter two items, paid in 1946 amount to $4,031.42.

Mytinger's computations are as follows (R. 269-273):

The net worth of Olender for Dec. 31, 1944—$191,002; for 1945—$260,113; for 1946—$283,193. But the foregoing arguments demonstrate that Mytinger's computations are erroneous. Adjust the same by the true amount of cash in the safe deposit box on Dec. 31, 1944, adding the sum of $20,550 for the Goodman suits, deduct the $20,000 in bonds from the net worth as of Dec. 31, 1945, add the value of 322 sailor suits to the costs of operation in 1945 (the suits were taken in inventory but no entry as to costs was made) adjust the payments of $6,903.02 to the 1944 net worth, the payments made to Barney's and to Money Back Smith, disallow the Government's contention that an additional $5,000 must be considered relating to the second Asturias stock payment, and we have a situation where none of the net worth computations are legally sufficient to base any computations upon.

Mr. Hellman, for the defense, correctly computed the entire matter, taking into consideration the foregoing major items and some minor items as follows: The net worth of Olender as of Dec. 31, 1944—$241,495, as of 1945—$271,463, as of 1946—$265,833. (R. 909-911.) That the combined tax liability for 1945 was $16,510.83 as against tax reported of $15,495.75; that the combined tax liability for 1946 was $4,417.02 as against tax actually

paid of $5,562.79—an overpayment of $1,145.77. (R. 920.)

CONCLUSION.

For the foregoing errors in the admission of prejudicial evidence over the objections of appellant, in the Court's instruction to the jury duly excepted to and to the insufficiency of the evidence to support the charges, the judgments should be reversed.

Dated, San Francisco, California,
July 20, 1953.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Appellant.

(Appendix Follows.)

Appendix.

Appendix

SPECIFICATION OF ERROR NO. 10.

Amplification thereof by portions of the record appearing in Volume III, pp. 1120 to 1139, testimony of Donald A. Jensen, showing identification of documents, objections of appellant, description of documents admitted as U.S. Exhibit No. 55, etc.

DONALD A. JENSEN, called as a witness for the Government, sworn.

The Clerk. Please state your name, your address and your professional calling to the Court and to the jury.

A. I am Donald A. Jensen, director of the Fresno County Department of Public Welfare. I reside at 4505 Madison Street, in Fresno, California.

Mr. Hagerty. Might I suggest, counsel, at this time, as I understand the purpose of the Government is to introduce or to offer into evidence certain records which may or may not be admissible, and to guard against error in the record, might I suggest that we present our side of the position in reference to the admissibility then in the absence of the jury, and since it is close to the time for the afternoon recess, might we do that now?

The Court. All right. I have no objection.

The jury is excused for the afternoon recess, and take a brief recess with the same admonition, ladies and gentlemen.

(Following proceedings outside the presence of the jury.)

Mr. Hagerty. As I understand the Government's position, the Government seeks to offer into evidence at this time certain affidavits in reference to the procurement of an old age pension for Mrs. Foote.

The Court. This matter was referred to previously in our colloquy concerning the admissibility of the affidavits, as well as the affidavit submitted by Mrs. Olender.

Mr. Hagerty. As I take it, and I believe I'm right—Mr. Drewes, you tell me——

Mr. Drewes. I will make a statement. There are in these files a number of form replies from various banks, your Honor, public welfare, Fresno, the earliest one is 1939 through 1942, by which we seek to establish that Laura Foote had no cash in banks over that period of time. You will recall defendant's testimony that he received $2,500 from Mrs. Foote which she had saved over a long period of time. There are also a number of reports reflecting much the same thing, which are filled out by the various investigators, as I take it, social workers from that department, in which successive dates are shown the assets of Mrs. Foote. It goes to the same point. And there is finally the affidavit of Mrs. Betty Olender, which is dated in May of 1939, in which she states that she has no cash in banks and no cash in—I think specifically in safe deposit boxes.

Your Honor will doubtlessly recall the defendant also testified that the gifts made over the ten year period were made to himself and to his wife jointly. That of course goes to impeach that testimony. There is the purpose of the showing.

Mr. Hagerty. Well, if your Honor please, of course it is perfectly conceivable that a gift could be made to the husband and the wife not have knowledge of it.

Mr. Shelton. That is a matter of rebuttal evidence, if your Honor please.

Mr. Hagerty. But this covers a period of time prior to the indictment, 1939, and in the year 1943, by one of these records itself, February 1943, the old age pension was discontinued as relatives assumed all the responsibility as of February 23, 1943, which antedates the inquiry that we are concerned with here, 1945 and 46.

Mr. Drewes. There is no question but that these documents pertain to a period which antedates the indictment. However, they are material to the issues which I have just stated as to what happened between 1930 and 1940 by the defendant's own testimony.

The Court. During the years——

Mr. Drewes. ——When these gifts were——

The Court. ——were accumulating or allegedly accumulating.

Mr. Drewes. And also the $2,500 which she allegedly accumulated over the period of years by his testimony.

Mr. Hagerty. The defendant has testified here that even his sister didn't know of these gifts during the period of time that it was going on.

Mr. Drewes. Well, those are out of the record, your Honor.

Mr. Hagerty. No, they are not.

Mr. Drewes. Those are matters to be rebutted.

Mr. Hagerty. It was on the record, the testimony of the defendant.

The Court. I think the documents are relevant.

Mr. Hagerty. I think that they are collateral impeachment, your Honor, at best, because there is not any affidavit there of the defendant.

(Further argument and discussion concerning the records of the Department of Public Welfare, Fresno County.)

The Court. The objection will be overruled.

(The following proceedings had in the presence of the jury.)

Mr. Drewes. Q. Mr. Jensen, you are the director of the Fresno County Department of Public Welfare?

A. I am.

Q. And how long have you held that position?

A. Since June of 1947.

Q. In response to a subpoena that has been served upon you have you brought with you the file of one Laura J. Foote?

A. I have.

Q. And is that file from the official files of the Fresno County Public Welfare Department?

A. It is.

Q. Was it kept in the regular course of business?

A. Yes, it was kept in a locked file room.

Q. As the director, are you the custodian of those files?

A. Yes, sir.

Q. May I see the file?

A. (Handing counsel.)

Mr. Drewes. Do you wish to examine them? (To counsel.)

Mr. Drewes. The Government will offer the files in evidence at this time, your Honor.

Mr. Hagerty. At this time, your Honor please, for the purpose of the record we will enter our objections to the admission of this file into evidence on the grounds that

it is an attempt to collaterally impeach the defendant on immaterial matters; it is hearsay; it involves statements of——

The Court. Counsel, I would suggest, without interrupting your objection, counsel, I would suggest that you offer such relevant or assertedly relevant documents as may be applicable or have a bearing on the controversy.

Mr. Drewes. I have given some thought to that problem. This is what I propose to do. I have before me photostatic copies of the documents in that file which the Government believes to be pertinent.

The Court. Why not offer the file for identification merely? Then if you have photostatic copies of certain abstracts from the files, then offer your photostats independently with the stipulation that they are true and correct copies of the items in the file, and as I indicated to you earlier, I will admit those subject to your objections. But the matter of offering the whole file should be done merely for identification.

The Clerk. U. S. Exhibit Number 55 for identification only.

(Thereupon the file in re Laura Jane Foote, Department of Public Welfare, Fresno County, marked for identification U. S. Exhibit Number 55.)

Mr. Drewes. Mr. Jensen, I show you a number of photostatic copies of documents and ask you if you have examined them?

A. I have examined them.

Q. And are those true copies of the documents which are in the file which you have just identified?

A. They are.

Mr. Drewes. May it be stipulated, counsel, that these documents, the photostats just identified, may be substituted for the file which has been marked for identification?

Mr. Hagerty. We would so stipulate, subject to our objection to their general admission into evidence, your Honor.

The Court. Now you state your objection.

Mr. Hagerty. We will object to their admission into evidence on the grounds they are hearsay, it is an attempt to impeach the defendant's testimony on collateral issues; furthermore that the whole scope covered by the documents in question at the dates the period covered within this indictment which is, namely, 1945 and 46, and the base year of 1944, and is not within the issues framed by the indictment.

The Court. And the objection is overruled.

The Clerk. U. S. Exhibit Number 55 in evidence.

(Thereupon photostatic copies of extracts from the file in re Laura Jane Foote, Department of Public Welfare, Fresno County, received in evidence and marked U. S. Exhibit 55.)

* * * * * * *

Mr. Drewes. I will describe each document, ladies and gentlemen, and then simply read from it those parts as I have indicated which I think are pertinent to the issues here. As I stated before, some of them are very extensive and very detailed.

The first document is entitled "Certificate of verification of eligibility which must accompany application for old age security" and it is dated the 15th day of May,

1959. There appears much, a considerable amount of data with respect to Laura J. Foote.

The date is—counsel advised me I stated the wrong date. The date is May 15, 1939.

There is a good deal of personal data in this document referring to Laura Jane Foote. One item is "Number 7" as follows:

"Has personal property value $152.09, including $152.09 cash in account with daughter."

And that is signed by Edith V. Forest, County Visitor.

The next document "Report of Investigation, old age security."

"Applicant's name: Laura Jane Foote.

"Address: 2914 Kearn Street, Fresno."

And again there is a good deal of data here.

"Real property: None.

"Personal property: (Cash, mortgages, trust deeds, stocks, bonds, chattels)

"Owned by applicant: None.

"Insurance: None."

The last item on the first page is entitled "Responsible relatives: (Spouse and adult children)" and there is noted there six children, and the name of each is given. The last is Betty B. Olender, address: Oakland; relationship: Daughter; "Form AG. 14 filed; yes. Household income: $150;

"Number of dependents: Four.

"Applicants' present income from relatives:

"Housing from daughter, $7.00."

It is signed Edith V. Forest and it is dated May 15th, 1939.

The next document is entitled "Renewal Application, Old Age Security, year beginning June, 1940."

"County, Fresno.

"Full name of Applicant: Laura Foote.

"Section V. Changes: Have any changes occurred in the following for you or your spouse since last report:

"Property Holdings: No.

"Property Valuation: No.

"Property Encumbrances: No.

"Savings or cash on hand: No.

"Personal Property: No.

"Stocks, bonds, other securities: No.

"Earnings: No.

"Insurance: No."

That is signed Laura Jane Foote, and the date is August 7th, 1940.

On the back is the notation in longhand:

"Conditions remain the same. Recommend that aid continue."

Signed Dorothy Blakely, County Agent.

The Court. What is the date?

Mr. Drewes. That is the same date, August 7, 1940. It is the reverse form which I just—from which I just read.

The next report is captioned "Alameda County Charities Commission, Property Report."

"Date: January 17, 1940.

"To: L. Burrill.

"Case No. 36458. Name: Foote, Laura Jane.

"Address, 351 Fairmount Avenue, Oakland.

"The property at above address is assessed to Emma L. Busby. We are unable to locate any property in the following names and no transfers appear on record since July 1, 1937:

"Laura Jane Foote.

"The above information is taken from the County records as of the following dates:

"Tax Collector's records as of March 1, 1938.

"Assessor's records as of date of transfers in Plat Books."

That is dated January 17, 1940, and the signature I cannot read.

Q. Can you locate that on your records, your original files?

A. Pardon me. What date?

Q. Alameda County Charities Commission, January 17th, 1940.

A. I have the original here.

Q. And by whom is that signed, Mr. Johnson?

A. It looks like P. F. Holtzknecht.

Q. Thank you.

The next document is entitled "Recipient's Affirmation of Eligibility for Old Age Security."

It reads in part as follows:

"I, Foote, Laura Jane, residing at 2914 Kern, Fresno, herewith affirm my believe that I am eligible for old age security, to wit:

"I do not own real property with an assessed value in excess of three thousand dollars.

"I do not have personal property in excess of five hundred dollars.

"I have acquired personal property consisting of none since my last application for old age security.

"I have disposed of personal property consisting of no change since my last application for old age security.

"Earnings: None.

"Rentals or proceeds of sale of property: None.

"Annuities or insurance: None.

"Stock dividends: None.

"Interest: Interest on deposit approximately $150 only.

"I have received during the the past year other than old age security income from following sources: None."

That is signed Laura Jane Foote.

"Subscribed and sworn to before me this 16th day of June, 1941, Alice M. Hall, Deputy County Clerk."

Now on the reverse of that form is "County Report of eligibility investigation:

"Real property: Verified information and source thereof. Property search on file. No property owned.

"2. Personal Property: Verified information and source thereof: Bank of America, Oakland.

"Savings Account 46457—$152.09 with Betty B. Olender."

Dated June 30, 1941, signed Alice M. Hall, County Investigator.

The next document is in the form of a letter in reply. It is a prepared form on the same document. It is

entitled "Fresno County, Department of Public Welfare, Fresno, California, June 17, 1941."

"Mrs. Laura Jane Foote.

"Dear Madam:

"All income and resources are to be taken into consideration in computing grants for blind aid and old age security as of July 1, 1941. It is therefore necessary that we have certain information at once so that we may complete our records. Please answer the following questions carefully and completely, sign and return to this office immediately:

"Alice M. Hall, social worker."

And then follows the part for the reply:

"What are your average monthly earnings: None.

"Do you receive cash or free room and board: You are taking $7.00 per month out of my pension for room rent.

"(7) Do you have savings, postal savings or stocks from which you expect an interest or dividend payment in July? No."

And that is signed Laura Jane Foote and it is stamped as having been received on June 22, 1941. As I stated before, the date of the original letter was June 17, 1941.

The next document is entitled, "Recipient's Affirmation of Eligibility for Old Age Security."

"I, Laura Jane Foote, residing at 2914 Kern Street, City Fresno, County of Fresno, California, herewith affirm my belief that I am eligible for old age security, to wit:

"I do not have personal property in excess of $500.

"I have acquired personal property consisting of none since my last application for old age security.

"I have disposed of personal property consisting of $150 savings since my last application for old age security."

And then there are similar questions:

"Earnings: None. Rentals or proceeds of sale of property: None."

"Annuities or insurance: None. Stock dividends: None. Interest: None."

That is signed Laura Jane Foote, and "Subscribed and sworn to before me this 17th day of June, 1942, Fayes Clark, Deputy County Clerk."

And again on the reverse side of this form, as in the earlier form that I read to you, is the "County Report of Eligibility Investigation."

"1. Real property: Verified information and source thereof. According to this statement she has no real property. Property search shows no recordings to 5/27/1942, no assessments to 5/29/1942.

"2. Personal property: Verified information and source thereof. Is claimed no personal property except her clothing and personal effects."

And that is signed Faye Clark and is dated the 29th of June, 1942.

The file contains a number of forms which are entitled "Authorization by Application for Financial Investigation." I will read the first to you and that, of course, will suffice to describe them all.

"To: Any bank, trust company, postal savings department, Building and Loan Association, trust officer, insurance company or other financial institution.

"The undersigned who have applied for, or receiving, aid from the Fresno County Department of Public Welfare, hereby authorize you to furnish said Fresno County Department of Public Welfare any information in your possession with reference to any bank accounts, postal savings, policies, deposits or money in your institution now or hereafter to my credit.

"Our case No. 3630."

It is signed Laura Jane Foote. Address: 2914 Kern Street, Fresno, California.

And then there is a section, the last half of this form, entitled "Returns: Bank of America, Oakland, savings account No. 46457, Mrs. L. J. Foote (2916 Kern Street, Fresno) joint with 'Betty B. Olender or M. H. Olender'. Present balance, $152.09."

That is dated May 5, 1939.

Now the next similar form, also signed by Mrs. Foote, does not itself bear a date but the return section is as follows:

"Security First National, Fresno, 5/10/39. No funds.

"Bank of America—Fulton 5/23/39, no funds."

Mr. Jensen. "Fulton" is that a branch in Fresno, the Bank of America?

A. That is one of the branches of the Bank of America.

Incidentally, Your Honor, I might explain these forms. At the time we sent out—we got the applicant's signed statement releasing such information and then this form was cleared through all the major banks in Fresno, just one right after the other, to see if there was any funds on deposit which had not been reported. That is why there is a series of notations on the same form.

Q. Then the next is a similar form signed by Laura Jane Foote. The return is as follows:

"5/16/39, Central Bank. No account. Bank of America, no account. Central bank, no account. Farmers & Merchants, no account. Anglo-California, no account. American Trust Company, no account."

That is dated May 18, 1939.

The next form is similarly signed by Mrs. Foote. The return is as follows:

"Bank of America, September 27, 1940. No funds. Bank of America—Fulton, September 30, 1940, no funds. Security First National, September 30, 1940, no funds."

The next form is also signed by Laura Jane Foote.

"Returns: Bank of America, Fulton, August 13, 1941, no funds. Security First National, August 22, 1941, no funds. Bank of America, main, August 28, 1941, no funds."

The next form is a similar form and also signed by Mrs. Foote:

"Returns: Bank of America, August 4, 1942, no funds. Security First National Bank, August 4, 1942, no funds. Bank of America, Fulton, August 15, 1942, no funds."

The next form has obviously the same purpose but it is somewhat different in form. This is addressed to the Bank of America, Branch No. 46457, Oakland, California, and it is dated the 25th of July, 1942.

"Gentlemen:

'We are enclosing herewith authorization for examination and report on any accounts the following may have, or may have had with you.

"Foote, Laura, Jane."

And then the reply on the same form:

"We have reviewed our records but they do not indicate that the above party has any accounts at this office. Bank of America, N. T. & S. A., Oakland Main Office, J. P. Fiorani, Assistant Cashier."

The file also includes the following document:

Statement of responsible relative of applicant under the Old Age Security Act of 1935.

"In order that the request of the below-named applicant may be considered, it is necessary that a statement of the financial condition of legally responsible relatives, including children and spouse of the applicant, be furnished the State by the County. The preparation of this form by responsible relatives will greatly facilitate completion of the investigation which must be carried out through credit associations and others if the relative does not choose to prepare a statement. This form may be returned in care of the applicant or mailed directly to Fresno County, Department of Public Welfare, 2107 Inyo Street, Fresno, California.

"Statement of responsible relative.

"I, Mrs. Betty Olender, 351 Fairmount, Oakland, California, of Oakland, County of Alameda, State of California, the daughter of Mrs. Laura Foote, an applicant for aged aid, do make the following answers to the questions below relative to my ability to aid such applicant."

Then there are some immaterial questions which have been answered and the following heading:

"Assets: Do you or your spouse own your own home? No. What is the value of other real estate in which you have an interest?"

That is blank.

"Have you any cash on hand? No.

"Have you deposits in the bank: No.

"Have you deposits with building and loan associations: No.

"Have you postal savings: No.

"Do you keep funds in the safe deposit box: No.

"Do you own negotiable securities? No.

"Do you own other stocks, bonds, mortgages or securities? No.

"Do you own personal property?"

Then the amount is shown $100.

"Have you a part interest in property?"

That is blank. Or there is a little dash in it.

"Do you have an automobile? Yes. Make and model: 1933 Buick. Value: $100."

Then there is a section of "Obligations." None are shown.

"Monthly income: What is your salary? Zero.

"What income do you receive from building and loan associations, stocks and bonds, rentals, other income:"

And in each case is zero, zero, zero, zero.

"Does your property produce farm or garden produce for household use? Zero. What are your spouse's earnings? $150."

And then there is a section for monthly expenses, and the following:

"County of Alameda, State of California, SS. Betty B. Olender, being first duly sworn, states upon oath that the answers to the foregoing are her own statements; that they are of her own knowledge true in every particular; that they are the whole truth and that she has not prac-

ticed evasion nor withheld information as to her ability to aid her parent or spouse."

And that is signed Betty B. Olender.

"Subscribed and sworn to this 23rd day of May, 1939, before me, a Notary Public of the County and State above written, Joseph Croter, Notary Public in and for the County of Alameda, State of California."

Will you turn to that particular affidavit, Mr. Jensen?

A. Can I have the date on that again, please?

Q. Yes. I will see if there is a date. May 26th, 1939.

A. I have that.

Q. You will note, Mr. Jensen, that two lines are drawn through the name "Betty B. Olender," apparently with pen, and the initials J. C. N. P. appear just above the signature of Betty B. Olender. Do you see that?

A. Yes, sir.

Q. Do you know why those lines are drawn through the name?

A. No, I do not.

Q. Will you state, Mr. Jensen, according to your records, when Laura Jane Foote first received old age assistance?

A. She first received old age assistance in Fresno County in June of 1938. But that was on a transfer from Alameda County. The law in California provides that as an old age pensioner moves from one county to another the county where they originally reside will pay aid for a full year until they gain residence in the second county. I do not know the exact date she started to receive aid in Alameda County, but there is an application—her original application was signed in October of 1936.

Q. Is that in your files?

A. It is. A copy of that is in my files. Alameda County, when they transferred the case to Fresno County, sent a copy of the original application.

Q. Mr. Jensen, does your file reflect when Mrs. Foote ceased receiving old age assistance?

A. Yes. The file—and I will quote here—old age security was discontinued as relatives assumed all responsibility as of February 28th, 1943.

Mr. Drewes. I have no further questions.

Exhibit "1"

UNITED STATES EXHIBIT NO. 24.

MILTON H. OLENDER

COMPARATIVE NET WORTH STATEMENT

As at December 31, 1947 and December 31, 1941

ASSETS	Dec. 31, 1947	Dec. 31, 1941
on Hand and in Banks—Exhibit "2".........	$ 19,443.80	$ 82,027.30
s and Bonds—Exhibit "3"	88,151.15	xx
Estate Holdings—Exhibit "4"	80,886.09	33,000.00
Investment—Exhibit "5"	46,038.01	23,876.61
—Exhibit "6"	10,300.00	xx
le Premium Life Insurance Policy............	15,833.46	xx
TOTAL ASSETS............................	$260,652.51	$138,903.91
s—Personal Loans by Mrs. J. Olender—Mother	15,500.00	xx
Net Worth—Exhibit "7"	$245,152.51	$138,903.91

sonal check issued to Bank of America dated
ie 5, 1945, for $15,833.46. Check Number 2396
$15,000.00 transferred from the business bank
ount to the personal bank account of Milton
nder and deposited in his account for this trans-
ion on June 1, 1945.

ginally, loan of $10,500.00 to business. On Jan. 1946 store check 2854 was issued to her in pay- it of this loan. She then endorsed this check k to Milton Olender as a personal loan and he d the proceeds in the purchase of 500 Bank of ierica Stock. See Exhibit "3"—Note "6".....	$ 10,500.00
ed by Mrs. J. Olender on October 31, 1942 as payment on purchase of home at 351 Fairmont. sited in personal bank account Nov. 2, 1942....	5,000.00
TOTAL....................................	$ 15,500.00

Milton H. Olender, swear that this statement (including any accompanying
ules and statements) has been examined by me and to the best of my
ledge and belief is a true, correct, and complete statement, made in good
as of the date stated.

Milton Olender

Errol E. Cropsey
Witness
Internal Revenue Agent

cribed and sworn to before me this 13th day of September, 1948.

Seth L. Root, Internal Revenue Agent

Q. Is that in your files?

A. It is. A copy of that is in my files. Alameda County, when they transferred the case to Fresno County, sent a copy of the original application.

Q. Mr. Jensen, does your file reflect when Mrs. Foote ceased receiving old age assistance?

A. Yes. The file—and I will quote here—old age security was discontinued as relatives assumed all responsibility as of February 28th, 1943.

Mr. Drewes. I have no further questions.

Exhibit "1

UNITED STATES EXHIBIT NO. 24.

MILTON H. OLENDER

COMPARATIVE NET WORTH STATEMENT

As at December 31, 1947 and December 31, 1941

ASSETS	Dec. 31, 1947	Dec. 31, 194
Cash on Hand and in Banks—Exhibit "2".........	$ 19,443.80	$ 82,027.3
Stocks and Bonds—Exhibit "3"	88,151.15	x
Real Estate Holdings—Exhibit "4"	80,886.09	33,000.0
Store Investment—Exhibit "5"	46,038.01	23,876.6
Loans—Exhibit "6"	10,300.00	x
*Single Premium Life Insurance Policy...........	15,833.46	x
TOTAL ASSETS..........................	$260,652.51	$138,903.9
***Less*—Personal Loans by Mrs. J. Olender—Mother	15,500.00	x
Net Worth—Exhibit "7"	$245,152.51	$138,903.9

*Personal check issued to Bank of America dated June 5, 1945, for $15,833.46. Check Number 2396 for $15,000.00 transferred from the business bank account to the personal bank account of Milton Olender and deposited in his account for this transaction on June 1, 1945.

**Originally, loan of $10,500.00 to business. On Jan. 17, 1946 store check 2854 was issued to her in payment of this loan. She then endorsed this check back to Milton Olender as a personal loan and he used the proceeds in the purchase of 500 Bank of America Stock. See Exhibit "3"—Note "6".....	$ 10,500.00
Loaned by Mrs. J. Olender on October 31, 1942 as part payment on purchase of home at 351 Fairmont. Deposited in personal bank account Nov. 2, 1942....	5,000.00
TOTAL..................................	$ 15,500.00

I, Milton H. Olender, swear that this statement (including any accompanyin schedules and statements) has been examined by me and to the best of m knowledge and belief is a true, correct, and complete statement, made in goo faith as of the date stated.

Milton Olender

Errol E. Cropsey
Witness
Internal Revenue Agent

Subscribed and sworn to before me this 13th day of September, 1948.

Seth L. Root, Internal Revenue Agent

Exhibit "2"

UNITED STATES EXHIBIT NO. 25.

MILTON H. OLENDER

CASH ON HAND AND IN BANKS

As at December 31, 1947 and December 31, 1941

	Dec. 31, 1947	Dec. 31, 1941
(1) Cash in Vault		$ 75,000.00
(2) Bank of America—Oakland—Commercial	$ 443.80	1,527.30
(3) Bank of America—Fresno—Savings A/C #129	3,000.00	3,000.00
(4) Trustee Accounts—Bank of America—Oakland for 3 children—#26518, #40020, and #40466—$5,000 each	15,000.00	xx
(5) Cash—Store Registers and Personal	1,000.00	2,500.00
Total	$ 19,443.80	$ 82,027.30

(1) See Affidavit as to creation of this fund. During the years 1941-1945, inclusive, there was a constant switching of funds between this Cash in Vault, Personal Bank Account, and Store Investment, so that it would be impossible to tell just how these funds were used. The following sums were expended from cash:

January 10, 1944—3 Cashier's Checks to Goodman @ $2,250.00	$ 6,750.00
January 22, 1944—3 Cashier's Checks to Goodman @ $2,250.00	6,750.00
January 22, 1944—3 Cashier's Checks @ $2,350.00 to Goodman	7,050.00
U. S. Government Bonds—December, 1944	8,000.00
U. S. Government Bonds—November, 1945	5,000.00
Creation of 3 Trustee Accounts for children—November 20, 1945	15,000.00

(4) See (1) above

(5) Deposited $1,500.00 in personal bank account in 1945

Exhibit "3
Page

MILTON H. OLENDER
STOCKS AND BONDS

As at December 31, 1947 and December 31, 1941

		12/31/47	12/31/41
(1)	U. S. Treasury—2¼%—1959-62	$ 33,000.00	$
	Less—Held for Mother—Purchased with her money	20,000.00	
	Balance—Milton H. Olender	13,000.00	
(2)	U. S. Treasury—2%—1951-53	10,000.00	
(3)	U. S. Treasury—2¼%—1956-59	1,000.00	
(4)	U. S. Treasury—2%—1952-54	13,000.00	
(5)	U. S.—Series "E"—Face $1,025.00	768.75	
(6)	750 Bank of America—N.T. & S.A.—Common	37,437.50	
(7)	100 Kingston Products	850.00	
(8)	100 Blair and Co., Inc.	812.50	
(9)	50 Blair and Co., Inc.	374.75	
10)	100 Compania Azucarera Vicana	337.50	
11)	50 Victor Equipment	570.15	
12)	500 Asturias Export Corp.	5,000.00	
13)	Contra Costa Associates	5,000.00	
	Total	$ 88,151.15	None

(1)	Store Check 2712—11/9/45	$ 25,000.0
	Cash from Mother for her bonds	20,000.0
	Cash—Nov. 1945	5,000.0
	Store Check 2332—4/28/45	5,000.0
	Store Check 2625—9/30/45	3,000.0
	Total	$ 58,000.0
	Less—Sold 8/22/46 and proceeds used on purchase of home @121 Alpine Terrace	25,000.0
	Cost of Bonds on Hand—12/31/47	$ 33,000.0
(2)	Personal Check—9/12/43	5,000.0
	Personal Check—10/1/43	5,000.0
	Total Cost—12/31/47	$ 10,000.0
(3)	Personal Check—5/10/45 to J. C. Penny Co.	$ 1,000.0
(4)	Store Check 1991—12/16/44	$ 5,000.0
	Cash	8,000.0
	Total Cost—12/31/47	$13,000.0

(5) Various purchases of Series "E" bonds

Exhibit "3"
Page 2

MILTON H. OLENDER

STOCKS AND BONDS

As at December 31, 1947 and December 31, 1941

(6)	Store Check 2867—1/24/46		$ 7,500.00
	Store Check 2854—1/17/46 to Mrs. J. Olender —endorsed back to Milton Olender. In payment of loan on business and then loaned back to Milton Olender as a personal loan...		10,500.00
	Personal check—1/24/46		5,562.50
	Total Cost of 500 Shares		23,562.50
	Store Check 3151—6/12/46	$ 6,000.00	
	Personal Check—6/13/46	7,875.00	
	Total Cost of 250 Shares		13, 875.00
	Cost of 750 Shares—On Hand 12/31/47		$ 37,437.50
(7)	Personal Check to Frank C. Knowlton—4/17/46		$ 850.00
(8)	Personal Check to Frank C. Knowlton—11/26/45		$ 812.50
(9)	Purchase by Alkus as part payment on $850 advanced by Olender on 4/17/46 for purchase of stock for him		$ 374.75
(10)	Olender—Alkus Check 10/26/45		$ 675.00
	½ for Alkus		337.50
	Cost of 100 Compania Azucarera Vicana		$ 337.50
(11)	Purchase by Alkus as part payment on $850 advanced by Olender on 4/17/46—Difference paid to Alkus in Cash		$ 570.15
(12)	Personal Check to Asturias Import and Export Co. 12/12/46		$ 5,000.00
(13)	Personal Check to Harry Kagan—7/6/46		$ 5,000.00

Exhibit "4"

MILTON H. OLENDER

REAL ESTATE HOLDINGS

As at December 31, 1947 and December 31, 1941

		12/31/47	12/31/41
(1)	Wilson Home—Fresno Rental Property......	$ xx	$ 8,750.00
(2)	Riverdale Ranch	xx	3,000.00
(3)	¼ Interest in Fresno Olender Building.......	10,493.74	13,750.00
(4)	Home—121 Alpine Terrace	45,638.20	xx
(5)	Furniture—Personal	24,754.15	7,500.00
	Totals..............................	$ 80,886.09	$ 33,000.00

(1) Sold 5/29/46—See Tax Return for 1946

(2) Sold 4/2/46 for $3,000. Proceeds in Store Investment

(3) Value 12/31/41 of ¼ Interest		$ 13,750.00
Less—Depreciation Claimed		3,256.26
Year 1942	$ 431.26	
Year 1943	575.00	
Year 1944	575.00	
Year 1945	575.00	
Year 1946	550.00	
Year 1947	550.00	
Depreciated Value—12/31/47		$ 10,493.74

(4) Sold U. S. Bonds and used proceeds for purchase of home—8/22/46	$ 25,000.00
Personal check to E. H. Dimity—8/9/46......	1,000.00
Store Check 3259—8/27/46	19,638.20
Total Cost of Home	$ 45,638.20

(5) The Wilson home at Fresno had $2,500 worth of furniture in it and was rented furnished. When the home was rented unfurnished in about 1942 or 1943 this furniture was moved to the Olender Building at Fresno and sold piece by piece at a loss. No loss was claimed on the tax return on the sale of this furniture. Taxpayer also had $5,000 worth of personal furniture which was moved to the home at 351 Fairmont when it was purchased in 1942. This house was sold 2/7/47 as per the 1947 Return. Part of this furniture was sold with the house and the balance was sold at auction at Ford's Auction House, Oakland, in 1947. No loss was claimed on this furniture. Total estimated loss on these furnishings at both houses was about $3,000.00.

Personal check No. 126 dated 2/11/47 for $24,754.15 for purchase of furnishings for home at 121 Alpine Terrace.

Exhibit "5"

MILTON H. OLENDER

STORE INVESTMENT

As at December 31, 1947 and December 31, 1941

Account	Dec. 31, 1947	Dec. 31, 1941
Cash in Bank	$ 6,977.59	$ 381.00
Merchandise Inventory	46,493.46	29,943.90
Furniture and Fixtures	xx	1,011.35
Total Assets	$ 53,471.05	$ 31,336.25
Less—Accounts Payable	7,433.04	7,459.64
Store Net Worth	$ 46,038.01	$ 23,876.61

Exhibit "6'

MILTON H. OLENDER

LOANS RECEIVABLE

December 31, 1947

	Detail	Amount
ontra Costa Associates:		$2,800.0(
Personal Check—December 5, 1946	$1,000.00	
Personal Check—October 23, 1947	1,800.00	
ilton Schiffman:		7,500.0(
Olender-Alkus check—May 14, 1947	2,000.00	
Personal Check—August 22, 1947	2,000.00	
Personal Check—October 28, 1947	1,000.00	
Personal Check—November 24, 1947	2,500.00	
Total Loans		$10,300.0(

Exhibit "7"

MILTON H. OLENDER

ANALYSIS OF INCREASE IN NET WORTH

January 1, 1942 to December 31, 1947

Descriptive	Detail	Amount
Net Worth—December 31, 1947—Exhibit "1"......	$	$245,152.51
Less—Net Worth—December 31, 1941—Exhibit "1"		138,903.91
Net Increase in Net Worth		$106,248.60
ACCOUNTED FOR AS FOLLOWS		
Net Taxable Income Reported on Returns (100% on Capital Gains)	$	$170,888.11
Year 1942—per Returns	24,635.14	
Year 1943—per Returns	28,124.37	
Year 1944—per Returns	37,059.70	
Year 1945 (per Returns $41,067.61 + Capital Gains $132.75)	41,200.36	
Year 1946 (per Returns)	23,514.62	
Year 1947 (per Returns $14,063.92 + Capital Gains $2,290.00)	16,353.92	
Less—Estimated Unclaimed Losses on Sales of Furnishings		3,000.00
Net Income Accounted For		167,888.11
Less—Federal Income Taxes Paid—Husband and Wife—Net:		49,981.32
During Year 1942	174.08	
During Year 1943	8,829.83	
During Year 1944	7,862.32	
During Year 1945	16,341.94	
During Year 1946	17,326.59	
During Year 1947	5,508.76	
Total..............................	56,043.52	
Less—Refunds of 1946 Income Tax in 1947	6,062.20	
Net Income—After Federal Income Taxes—January 1, 1942 to December 31, 1947		117,906.79
Add—Gifts from Mother—Exhibit "1"—Schedule "A"		10,500.00
Net Increase Accounted For		128,406.79
Less—Estimated Living Expenses (above deductible personal expenses)		22,500.00
Year 1942	3,000.00	
Year 1943	3,000.00	
Year 1944	3,000.00	
Year 1945	3,500.00	
Year 1946	4,000.00	
Year 1947	6,000.00	
Excess in Increase Accounted for Over Federal Income Taxes and Estimated Living Expenses—Jan. 1, 1942 to Dec. 31, 1947		

Exhibit "7
Schedule "A

MILTON H. OLENDER

GIFTS FROM MRS. J. OLENDER—MOTHER
(Per Books of Mrs. J. Olender—Information from M. H. Olender)

WITHDRAWALS FROM SAVINGS ACCOUNTS IN FRESNO

Date	Amount	
February 3, 1942	$ 1,000.00	out
March 31, 1943	1,000.00	out
January 6, 1944	2,000.00	out
July 5, 1944	2,500.00	out ?
December 15, 1944	1,000.00	out
January 2, 1945	3,000.00	out
Total	$10,500.00	

Schedule 3

DEFENDANT'S EXHIBIT AK.

MILTON H. OLENDER

NET WORTH

	Dec. 31, 1944	Dec. 31, 1945	Dec. 31, 1946
ASSETS:			
Cash in store registers	$ 2,500.00	$ 1,000.00	$ 1,000.00
Net investment, Army and Navy Store	77,832.48	89,800.50	57,414.65
Nonbusiness bank accounts	3,822.89	31,485.58	36,783.05
Corporation stock (excluding Asturias)	552.95	1,150.00	43,382.40
Asturias stock or advances			10,000.00
U. S. Savings Bonds, Series "E"	693.75	768.75	768.75
Real Estate, net of depreciation...	31,600.00	30,875.00	68,511.31
Household furniture	5,000.00	5,000.00	29,701.67
Loan receivable, Contra Costa Associates			1,000.00
U. S. Treasury Bonds	24,000.00	82,000.00	57,000.00
Paid-up Life Insurance		15,833.46	15,833.46
Cash in safe deposit box	50,000.00	7,200.00	
Total Assets	$196,002.07	$265,113.29	$323,395.29
LIABILITIES:			
Loan payable, Mrs. J. Olender....	$ 5,000.00	$ 5,000.00	$ 15,500.00
Account payable, W. and J. Sloane			24,701.67
Total Liabilities	$ 5,000.00	$ 5,000.00	$ 40,201.67
NET WORTH per Government Computation	$191,002.07	$260,113.29	$283,193.62

DJUSTMENTS

ADDITIONS

	Dec. 31, 1944	Dec. 31, 1945	Dec. 31, 1946
Cash in Safe Deposit Box No. 56, Bank of America, Main Office, Oakland:			
Balance per Schedule 4	$ 72,039.97	$ 30,825.43	$ 385.02
Balance per Government Net Worth	50,000.00	7,200.00	
Increase in Cash in Safe Deposit Box	$ 22,039.97	$ 23,625.43	$ 385.02
Army-Navy Store check No. 2200, drawn December 23, 1944 and deposited in personal bank account January 10, 1945	1,000.00		
Amount paid for Goodman sailor suits, awaiting disposition of wrong sizes received, not taken into account in store inventory on books, per Schedule 1	20,550.00		
Overstatement of accounts payable	6,903.02		
Proceeds of Saraga check dated November 15, 1945 in possession of Leavy, per Schedules 1 and 2..		7,725.00	
Total Additions	$ 50,492.99	$ 31,350.43	$ 385.02
REDUCTION			
U. S. Treasury Bonds of mother, Mollie Olender, included in Government computation		(20,000.00)	(20,000.00)
Net Additions and (Reduction) to Net Worth	$ 50,492.99	$ 11,350.43	$(19,614.98)
ET WORTH	$241,495.06	$271,463.72	$263,578.64

Schedule 3-A

MILTON H. OLENDER

NET INCOME

			1945	1946
Net Worth at December 31st			$271,463.72	$263,578.64
Net Worth at January 1st			241,495.06	271,463.72
Increase or (decrease) in Net Worth			$ 29,968.66	$ (7,885.08)
Add:				
Non-deductible expenditures—				
Per stipulation			19,081.32	23,985.63
Not covered by stipulation—				
I. Magnin & Co.				863.72
Gray Shop				1,391.01
Total Income			$ 49,049.98	$ 18,355.29
Deduct:				
Non-taxable portion of net gain from sales of assets (stipulated)			139.77	464.47
Non-taxable gifts received:				
January 2, 1945 Mollie Olender, Mother		$3,000.00		
August 24, 1945 Mrs. Widrin		575.00		
1945 Mrs. Foote		2,500.00	6,075.00	
Net Taxable Income			$ 42,835.21	$ 17,890.82
Net Taxable Income per Returns:				
	Husband	Wife		
1945	$ 21,096.38	$ 19,971.23	41,067.61	
1946	12,514.81	10,999.81		23,514.62
UNDERSTATEMENT OF INCOME			$ 1,767.60	
OVERSTATEMENT OF INCOME				$ 5,623.80

Schedule 4

MILTON H. OLENDER

DISPOSITION OF CASH IN SAFE DEPOSIT BOX

Date	Description	Additions	Withdrawals	Balance
1944				
May 5	Cash in Safe Deposit Box per count by Milton Olender and Monroe Friedman..			$75,000.00
" 5	Cash brought back from Texas trip.....	$7,500.00		
June 16	Transfer to personal bank account........		$ 100.00	
" 22	Transfer to personal bank account........		400.00	
" 27	Transfer to personal bank account........		1,500.00	
July 5	Gift from mother, Mollie Olender, per U.S. Exhibit 24 (Ex. "7", Sched. "A")...	2,500.00		
" 17	Transfer to Olender-Elkus bank account..		1,500.00	
Aug. 24	Transfer to personal bank account........		300.00	
Dec. 15	Gift from mother, Mollie Olender, per U.S. Exhibit 24, (Ex. "7", Sched. "A")....	1,000.00		
" 16	Purchase of U.S. Treasury Bonds, 2%, 1952-54 per U.S. Exhibit 24 (Ex. "3", Pg. 1, Item 4)		8,000.00	
Nov. & Dec.	Purchase of merchandise for store by cash—Barney		2,160.03	
" 31	Balance of Cash			72,039.97
1945				
Jan. 2	Gift from mother, Mollie Olender, per U.S. Exhibit 24, (Ex. "7", Sched. "A")....	3,000.00		
"	Cash received from Fresno partnership...	1,807.46		
May 31	Purchased cashier's checks, Bank of America, 90-1:			
	#25196778 to Milton Olender (Deposited Army-Navy Store June 20, 1945)		3,000.00	
	#25196779 to Milton Olender (Purchased Treasury Bonds, 2¼%, 1959-62, Bank of America, College Ave. Branch, June 6, 1945............		3,500.00	
	#25196780, same as above		3,500.00	
	#25196781 To Milton Olender (Deposited Army-Navy Store June 20, 1945)		5,000.00	
June 9	Transfer to personal bank account		500.00	
Aug. 27	Transfer to personal bank account		522.00	
Nov.	Purchase of U. S. Treasury Bonds, 2¼%, 1959-62		5,000.00	
Nov.	Transfer to savings accounts:			
	Milton H. Olender, Tr. for James Harold Olender		5,000.00	
	Milton H. Olender, Tr. for Richard Raymond Busby		5,000.00	
	Milton H. Olender, Tr. for Audry Elaine Olender		5,000.00	
Nov. 20	Transfer to personal bank account........		10,000.00	
Dec. 31	Balance of cash			30,825.43
1946				
Jan.	Cash received from Fresno partnership...	1,725.11		
May 1	Transfer to personal bank account........		6,000.00	
" 1	Transfer to Olender-McGrete bank account		5,000.00	
" 2	Transfer to Olender-Elkus bank account..		1,700.00	
July 10	Transfer to personal bank account.......		570.38	
Sept. 18	Transfer to Olender-Elkus bank account..		2,500.00	
" 23	Transfer to personal bank account.......		1,500.00	
"	Down payment on furniture, W. and J. Sloane		1,000.00	
Nov. 25	Transfer to personal bank account		6,000.00	
Dec. 4	Transfer to personal bank account.......		2,800.00	
" 20	Transfer to personal bank account.......		1,500.00	
	Non-deductible expenditures included in stipulation		1,340.40	
	Non-deductible expenditures admitted in evidence: I. Magnin & Co. .... $ 863.73; Gray Shop 1,391.01		2,254.74	
Dec. 31	Balance of Cash......................			385.02

Net Wort
Net Wort

Increase

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1945 .
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UNDERS

OVERST

Amended Schedule 3-

No. 33181

Deft. Exhibit No. AK-1

Filed Oct. 2, 1952
C. W. Calbreath, Clerk
By Howard F. Magee
Deputy Clerk

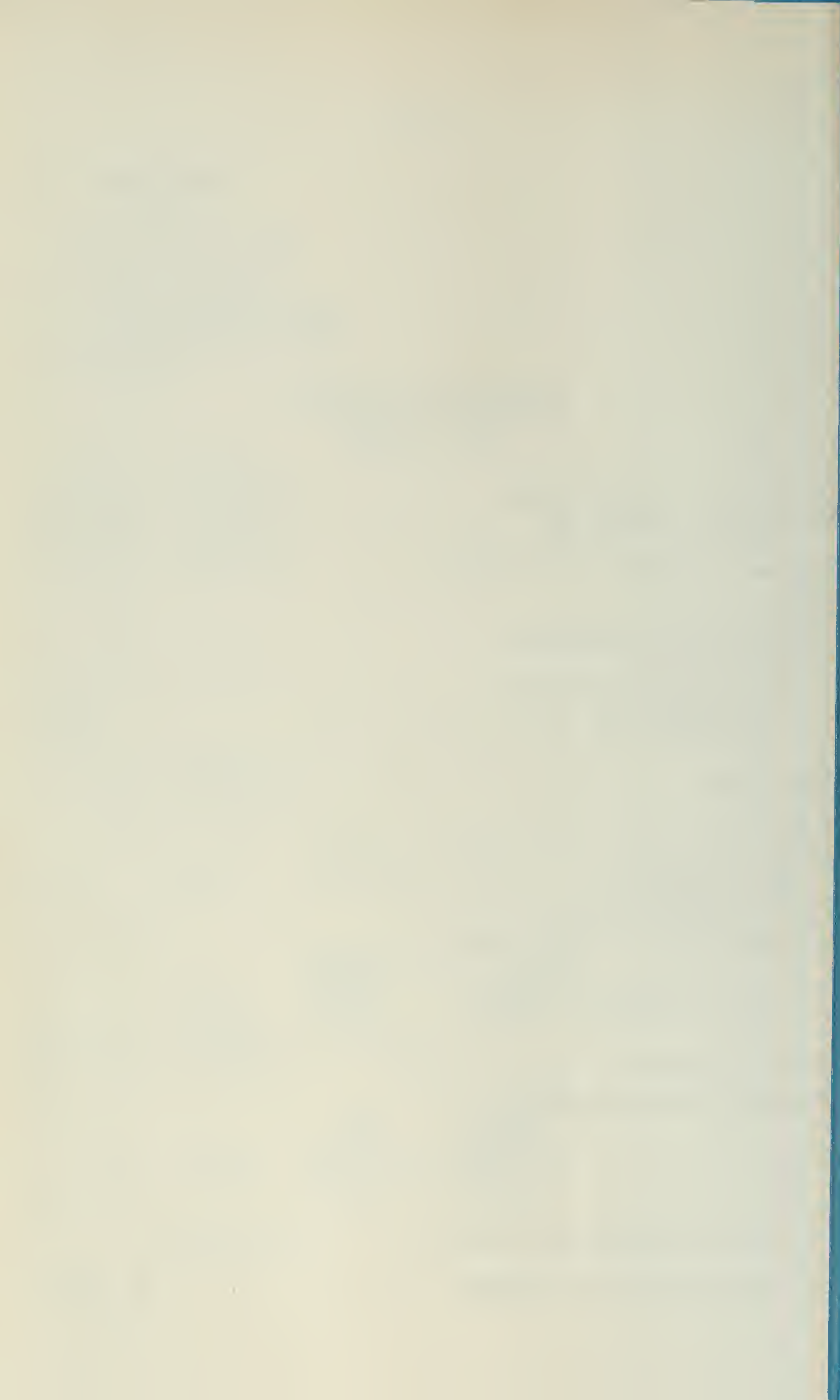
MILTON H. OLENDER

NET INCOME

		1945	1946
Net Worth at December 31st		$271,463.72	$265,833.38
Net Worth at January 1st		241,495.06	271,463.72
Increase or (decrease) in Net Worth		$ 29,968.66	$ (5,630.34)
Add:			
Non-deductible expenditures—			
Per stipulation		19,081.32	23,985.63
Not covered by stipulation—			
I. Magnin & Co.			863.73
Gray Shop			1,391.01
Total Income		$ 49,049.98	$ 20,610.03
Deduct:			
Non-taxable portion of net gain from sales of assets (stipulated)		139.77	464.47
Non-taxable gifts received:			
January 2, 1945 Mollie Olender, Mother	$ 3,000.00		
August 24, 1945 Mrs. Widrin	575.00		
1945 Mrs. Foote	2,500.00	6,075.00	
Net Taxable Income		$ 42,835.21	$ 20,145.56

Net Taxable Income per Returns:

	Husband	Wife	1945	1946
1945	$ 21,096.38	$ 19,971.23	41,067.61	
1946	12,514.81	10,999.81		23,514.62
UNDERSTATEMENT OF INCOME			$ 1,767.60	
OVERSTATEMENT OF INCOME				$ 3,369.06

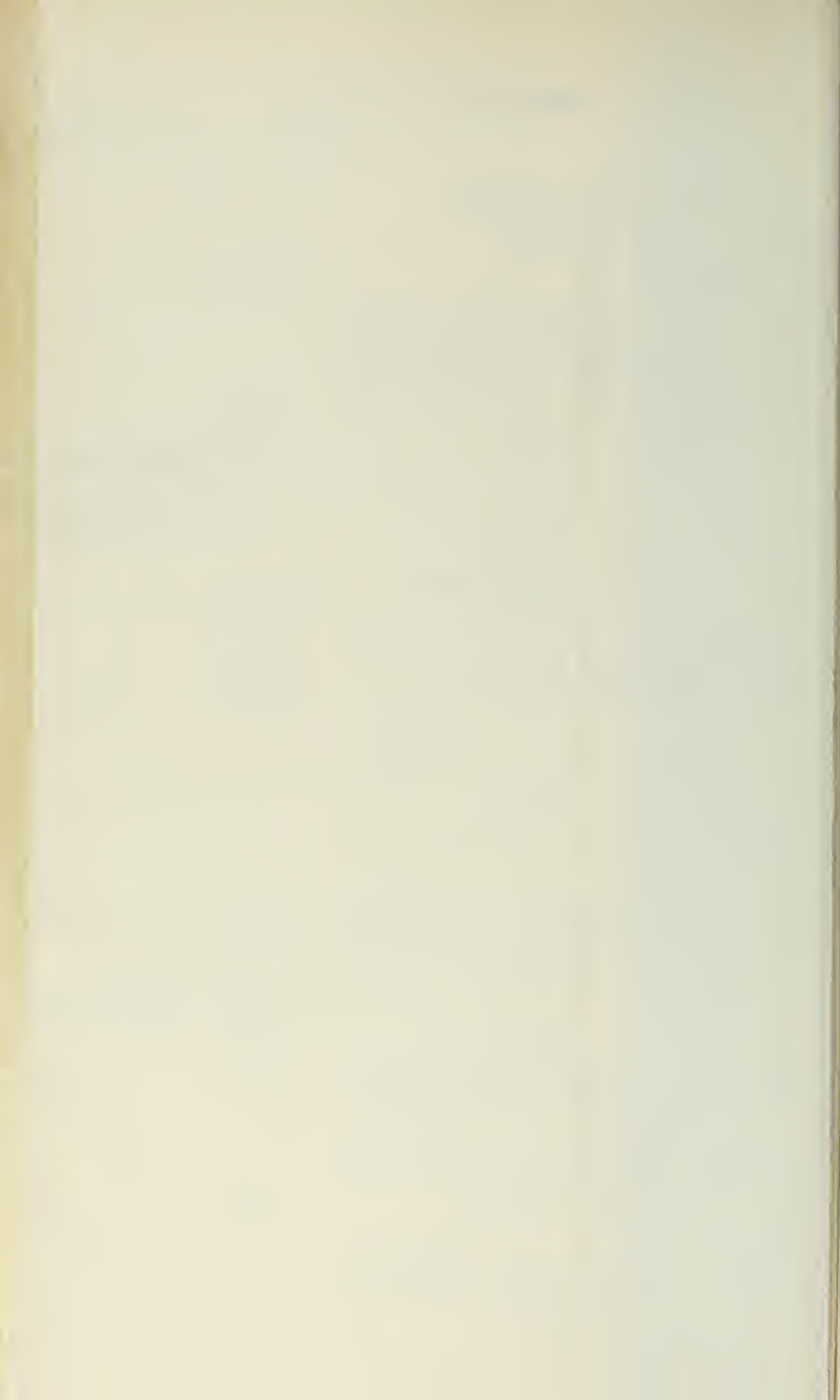


DEFENDANT'S EXHIBIT AL.

SCHEDULE 1

ANALY OF GOODMAN TRANSACTION

Milton Olender—Personal				Milton Olender — Business ARMY & NAVY STORE
Transactions not on store books				
Cash taken from safe box	$20,550.			
Purchased cashiers checks—given to Leavy. Leavy paid to Goodman for merchandise. (322 sailor suits at $25. each delivered, all wrong sizes. Not taken into regular store inventory.)	$20,550.			
	$5,000.	Leavy sold 2C ts at cost for M. Olender to Lerman	$5,000.	Deposited in store bank account June 19, 1945. Additional investment credited to M. Olender capital account on books.
	$8,550.	342 suits unsold eavy, transferred to store	8,550.	Not charged to purchases on store books. 20 suits sold through store registers. 322 suits included in inventory at Dec. 31, 1945. (Resulting in understatement of cost of goods sold for 1945 and corresponding overstatement of profit by $8,550.)
280 suits sold by Leavy for M. Olender—spring 1945	$7,000.			
Proceeds turned over to Saraga by Leavy for additional merchandise—August 1945	$7,000.			
			$13,550.	Cash from personal account invested in business
			$18,000.	July 23, 1945 M. Olender drew 5 checks of $3,600. each to Saraga.
			6,500.	Aug. 2, 1945 M. Olender drew check of $6,500. to Saraga.
			$24,500.	Total of Olender's store checks paid to Saraga (via Leavy)
Refund sent to M. Olender—November 1945. Saraga unable to furnish merchandise ordered	$7,000.		(23,775.)	Merchandise shipped by Saraga to M. Olender, charged to purchases on store books.
	725.	Refunded to M. Ok. Included in check from Saraga	$ 725.	Reimbursed business. (Cash debited and accounts payable credited in amount of $725. under date of Nov. 30, 1945)
Total of Saraga check dated Nov. 15, 1945. Endorsed by M. Olender and given to Leavy to purchase merchandise. Check not deposited)	$7,725.			
Check or proceeds thereof given to Saraga by Leavy for additional merchandise. (Check outstanding as of Dec. 31, 1945)	$7,725.			
Saraga again unable to deliver merchandise. Sent refund check to M. Olender. Deposited to personal bank account April 5, 1946. Check returned by bank as uncollectible.	$7,725.			
Saraga sent new certified check to M. Olender, which was also deposited in his personal account on June 28, 1946	$7,725.			



SCHEDULE 2

ANALYSIS OF SARAGA TRANSACTIONS

(1)	Merchandise invoiced 7/31/1945 1000 suits at $25.00	$25,000.00
(2)	Merchandise not delivered 49 suits at $25.00	1,225.00
(3)	Net merchandise shipped (Per M. Olender books PR 41— 7/31/45)	$23,775.00
(4)	Total paid through store checks (Per M. Olender books, C.P. 53) 7/23/45 $18,000.00 8/2/45 6,500.00	$24,500.00
(5)	Merchandise shipped (Per M. Olender books, PR-41) 7/31/45	23,775.00
(6)	Refund due store (Per M. Olender books, G.J. 21) 11/30/45	725.00
(7)	Refund due Milton H. Olender, personal (Represents proceeds turned over by Leavy to Saraga August, 1945 per Saraga books, page 84)	7,000.00
	Amount of Saraga check dated 11/15/45 (Proceeds turned over to Leavy in 1945 for transmission to Saraga and refunded in 1946.)	$ 7,725.00

UNITED STATES EXHIBIT NO. 15.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
—against—
MILTON H. OLENDER,
Defendant.

No. 33181

STIPULATION

This stipulation is entered into by and between the parties to this proceeding (by their respective counsel). The parties are bound by this stipulation for the purposes of this proceeding only, and this stipulation does not preclude either party from offering evidence of any character bearing on or related to willfulness or lack of willfulness, or any evidence relating to items of assets, liabilities or expenditures of Milton H. Olender or Mrs. Betty Olender which are not included in this stipulation. Each party shall have the right to show the sources involved in items in this stipulation.

1. On the dates shown below Milton H. Olender and his wife, Mrs. Betty Olender, owned the following assets and owed the following liabilities (both at cost):

SPECIFIED ASSETS AND LIABILITIES OF MILTON H. AND BETTY OLENDER AT CLOSE OF YEARS 1944, 1945 and 1946

ASSETS	12-31-44	12-31-45	12-31-46
Army and Navy Store (not on books)			
Cash in store registers	$ 2,500.00	$ 1,000.00	$ 1,000.0(
Army and Navy Store (per books)			
Assets			
Cash in bank (net after outstanding checks)	$ 19,881.55	$ 28,412.31	$ 2,598.3
Merchandise Inventory	85,011.26	83,394.64	57,449.5
Furniture and fixtures (net after dep.)	1,264.60	393.29	—0—
	$106,157.41	$112,200.24	$ 60,047.9

Assets (cont.)	12-31-44	12-31-45	12-31-46
Liabilities			
Accounts payable	$ 14,362.70	$ 8,074.74	$ 2,204.2
Notes payable	13,500.00	13,500.00	—0—
Fed. O.A.B. taxes	—0—	—0—	21.5
State U.E. taxes	462.23	825.00	21.5
Withholding taxes	—0—	—0—	386.0
	$ 28,324.93	$ 22,399.74	$ 2,633.3
Net Investment	$ 77,832.48	$ 89,800.50	$ 57,414.6

	12-31-44	12-31-45	12-31-46
ash in banks (other than commercial account Army and Navy Store)			
Bank of America, Oakland Main Office			
Checking accounts			
Milton H. Olender (after reconciliation for outstanding checks)	$ 277.22	$ 8,253.03	$ 5,477.1
Olender and Alkus (after reconciliation for outstanding checks)	434.58	90.28	2,911.7
Savings accounts			
Milton H. Olender, Trustee for James Harold Olender	—0—	5,000.00	5,050.1
Milton H. Olender, Trustee for Richard Raymond Busby	—0—	5,000.00	5,050.1
Milton H. Olender, Trustee for Audrey Elaine Olender	—0—	5,000.00	5,050.1
Mrs. Betty Olender	—0—	5,000.00	10,070.0
Bank of America, Fresno Main Office			
Savings account No. 129, Milton Olender	3,111.09	3,142.27	3,173.7
Totals	$ 3,822.89	$ 31,485.58	$ 36,783.0

	12-31-44	12-31-45	12-31-46
.ll corporation stock (except that of Asturias Import and Export Corporation) at cost			
Bank of America, Common	$ —0—	$ —0—	$ 37,437.5
Kingston Products Co., Common	—0—	—0—	850.0
Blair & Co., Inc., Common	—0—	812.50	1,187.2
Compania Azucarera Vicana	—0—	337.50	337.5
Victor Equipment Company	—0—	—0—	570.1
Contra Costa Associates	—0—	—0—	5,000.0
Packard Motors Co., Common	552.95	—0—	—0—
Totals	$ 552.95	$ 1,150.00	$ 45,382.4

Assets (cont.)	12-31-44	12-31-45	12-31-46
J. S. Savings Bonds Series E	$ 693.75	$ 768.75	$ 768.75
Real estate and improvements (exclusive of Army-Navy Store)	$ 35,275.00	$ 35,275.00	$ 71,261.31
Less: accumulated depreciation per tax returns	3,675.00	4,400.00	2,750.00
Net real estate	$ 31,600.00	$ 30,875.00	$ 68,511.31
Paid Up Life Insurance with New York Life Insurance Company	$ —0—	$ 15,833.46	$ 15,833.46
Loans receivable Contra Costa Associates	—0—	—0—	1,000.00
Household furniture (except purchased from W. & J. Sloan)	$ 5,000.00	$ 5,000.00	$ 4,000.00
Household furniture, etc., (purchased from W. & J. Sloan)	—0—	—0—	25,701.67
LIABILITIES			
Loans payable—Mrs. J. Olender	$ 5,000.00	$ 5,000.00	$ 15,500.00
Account payable—W. & J. Sloan	—0—	—0—	$ 24,701.67

. . . .

2. It is stipulated that Milton H. Olender and his wife, Mrs. Betty Olender, had in their possession at the close of the years involved United States Treasury bonds in the face amount set forth below. Each party shall have the right to offer evidence as to the ownership or source of the funds with which the bonds were purchased:

	12-31-44	12-31-45	12-31-46
U. S. Treasury 2% 1951-53	$ 10,000.00	$ 10,000.00	$ 10,000.00
U. S. Treasury 2¼% 1959-62	—0—	58,000.00	33,000.00
U. S. Treasury 2¼% 1956-59	1,000.00	1,000.00	1,000.00
U. S. Treasury 2% 1952-54	13,000.00	13,000.00	13,000.00
	$ 24,000.00	$ 82,000.00	$ 57,000.00

. . . .

3. During the years 1945 and 1945 Milton H. Olender and Mrs. Betty Olender, his wife, made expenditures which were not deductible for Federal income tax purposes in the following amounts:

1945	1946
$ 19,081.32	$ 23,985.63

These figures include Federal income taxes paid, but exclude all items a
earing in the preceding paragraphs of this stipulation and do not incluc
he following items of alleged expenditure during the year 1946:

Personal checks	
June 7, 1946 to Electrolux Corporation	$ 71.4
April 19, 1946 to George Belling	155.3
August 9, 1946 to Milt Young Motors	925.0
December 19, 1946 to Electrolux Corporation	71.8
Business checks (Army and Navy Store)	
January 31, 1946, No. 2879 to Mrs. Julius Olender	112.0
Cash payments	
I. Magnin Co. (year 1946)	2,674.6
Gray Shop (year 1946)	1,357.0
Lindburg's (year 1946)	416.3
Morris Brothers (October, 1946)	676.6
Total	$6,460.4

. . . . . .

4. In the years 1945 and 1946, Milton H. and Mrs. Betty Olender had ne
ng-term capital gains, the nontaxable portions of which were in the followin
nounts:

1945	1946
$139.77	$464.4

Respectfully submitted,

Chauncey Tramutolo (R.D.)
Chauncey Tramutolo
United States Attorney

Robert J. Drewes
Robert J. Drewes
Assistant United States Attorney

James H. Shelton
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John V. Lewis
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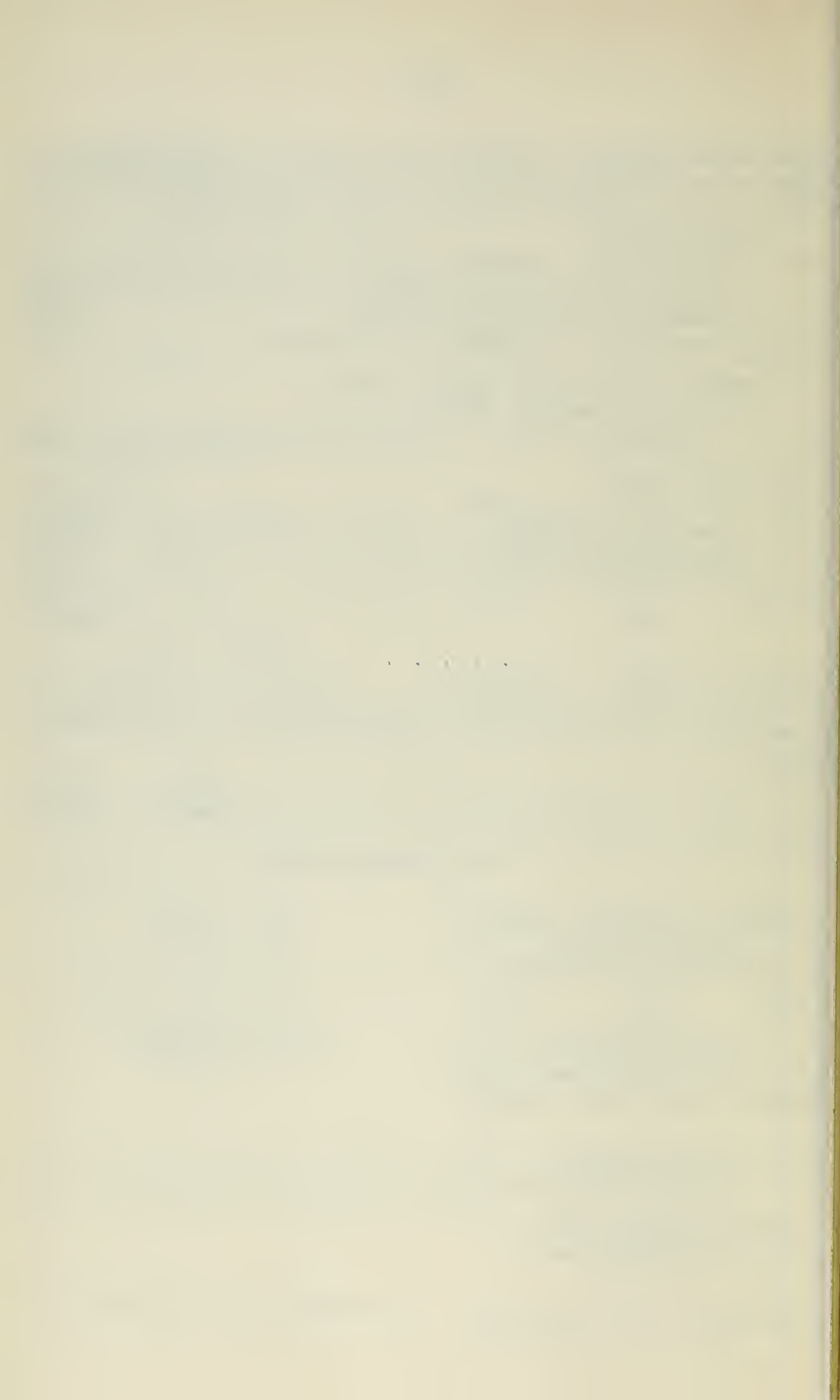
ATTORNEYS FOR DEFENDANT



No. 13,658

IN THE

United States Court of Appeals

For the Ninth Circuit

MILTON H. OLENDER,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California.

BRIEF FOR THE UNITED STATES.

H. BRIAN HOLLAND,
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ELLIS N. SLACK,
DAVID L. LUCE,
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Special Assistants to the Attorney General.

LLOYD H. BURKE,
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ROBERT J. DREWES,
Assistant United States Attorney.

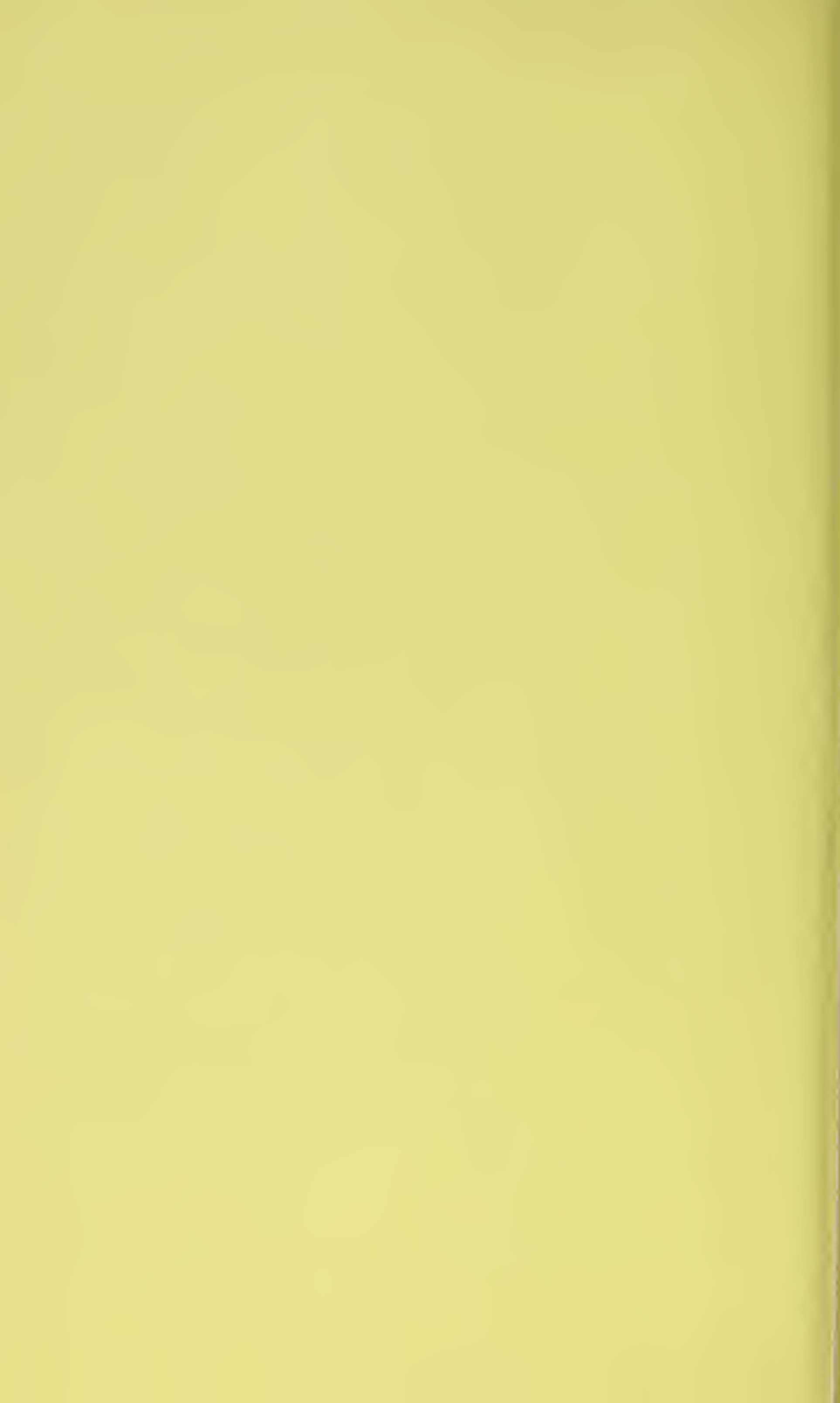

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Table of Authorities Cited

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Internal Revenue Code, Sec. 145 (26 U.S.C. 1946 ed., Sec. 145) 1, 3

Miscellaneous

Wigmore, Evidence (3d ed., 1940):
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No. 13,658

IN THE

United States Court of Appeals
For the Ninth Circuit

Milton H. Olender,
Appellant,
vs.
United States of America,
Appellee.

On Appeal from the United States District Court for the Northern District of California.

BRIEF FOR THE UNITED STATES.

OPINION BELOW.

The District Court wrote no opinion.

JURISDICTION.

On February 27, 1952, a four-count indictment was filed against appellant in the United States District Court for the Northern District of California charging wilful attempts to evade his own income taxes and those of his wife for the calendar years 1945 and 1946, in violation of Section 145(b) of the Internal Revenue Code. (R. 3-6.) Jurisdiction was conferred on the

District Court by 18 U.S.C., Section 3231. After a jury trial appellant was found guilty as charged (R. 13); sentence was imposed and judgment was entered on November 10, 1952. (R. 54-56.) Notice of appeal was filed on November 10, 1952. (R. 57.) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1291.

QUESTIONS PRESENTED.

1. Whether the evidence was sufficient to support the verdict.

2. Whether the trial court erred in permitting the Government to introduce in evidence an official file dealing with an application for old age security payments by Laura J. Foote, appellant's mother-in-law, in rebuttal to defense evidence of substantial cash gifts by Mrs. Foote to appellant.

3. Whether the trial court erred in permitting the Treasury Special Agent who investigated the case to state, in rebuttal, his conclusion that six substantial withdrawals from the bank accounts of appellant's mother, Mrs. Mollie Olender, did not represent gifts to appellant.

4. Whether the trial court erred in permitting Charles R. Ringo, the attorney-accountant retained by appellant to prepare a net worth statement in response to a request for such a statement by the examining agent, to testify as to the accounting work he performed.

5. Whether the trial court erred in instructing the jury that, if they found discrepancies between appellant's reported income and his actual income, they could consider his failure to offer any explanation.

STATUTE INVOLVED.

INTERNAL REVENUE CODE:

SEC. 145. PENALTIES.

* * * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * * *

(26 U.S.C. 1946 ed., Sec. 145.)

STATEMENT.

The four-count indictment charged appellant with wilfully attempting to defeat and evade a large part of his own and his wife's income taxes, computed on

the community property basis. The first and second counts charged him with filing false returns for the year 1945 in which he stated he and his wife had a net income of $41,067.61 on which the taxes amounted to $15,495.75, whereas he knew that their net income for the year was $67,982.22 and that the taxes due amounted to $32,517.74. The third and fourth counts charged that he filed false returns for the year 1946 in which he stated that their net income was $23,514.62 on which they owed income taxes of $5,562.79, whereas he knew that they had a net income of $46,042.43 and owed taxes amounting to $15,922.38. (R. 3-6.) After being convicted on all counts (R. 13), appellant was sentenced to three years' imprisonment and fined $10,000 on the first three counts, and he was fined $10,000 on the fourth count, a total of three years and $20,000. (R. 54-56.)

Prior to trial, since the Government's case was based upon increases in net worth, counsel entered into a stipulation covering most of appellant's assets and liabilities at the close of 1944, 1945, and 1946. (See Appellant's Opening Brief, Appendix, pp. 36-39, and R. 84-89.) At the trial the chief disputed issues of fact were:

1. whether appellant was entitled to a credit of $20,550 as of December 31, 1944, for sailors' suits bought from Goodman early in 1944;

2. whether he had $50,000 or $72,000 in cash in his safe deposit box as of December 31, 1944; and

3. whether bonds in the amount of $20,000 in his possession actually belonged to his mother.

The evidence to support the verdict may briefly be summarized as follows:

The Government's Evidence.—Appellant was sole proprietor of the Army and Navy Store in Oakland, California. He employed two or three salesmen but actively managed and operated the business himself (R. 221-225; cf. 516). He had no full-time bookkeeper. A girl came in for about an hour a day to post the entries, but appellant, according to his own statement, supervised the maintenance of the books himself. (R. 222-224.) He is a graduate of the University of California where he studied accounting. On occasions he prepared tax returns for friends and members of his family.[1] (R. 145, 177.)

During 1947 Special Agent Blanchard called on appellant several times during the course of an investigation of the George Goodman Sales Agency, a New York concern which dealt largely in sailors' suits during the war years.[2] On July 14, 1947, appellant stated under oath to Blanchard that he made only one purchase from Goodman during the year 1944 for

---

[1]He admitted that he graduated from the university with honors in economics as a result of writing a treatise on "Refunding of Bond Issues of the United Railroads". (R. 856-857.) And he admitted that he had himself prepared the income tax returns involved in the present case. (R. 433-435.)

[2]Goodman was under investigation because of black market activities. (R. 1184.) His ill health made him unavailable as a witness in the present trial. (R. 1199-1200.)

which he paid Goodman $1,380. This deal was recorded on the store books. Blanchard then called appellant's attention to several other instances during 1944 in which he had purchased cashiers' checks for cash, which checks were ultimately paid in to the account of Goodman. Appellant said that he had no records of any such transactions, and that he could neither recall purchasing the cashiers' checks nor receiving merchandise in return for them.[3] (R. 175-178; cf. 488-493, 780-787.)

In December 1947, as a result of Blanchard's report, and as a result of reports by banks that appellant had been engaging in large currency transactions (R. 178-187), Revenue Agent Root was assigned to investigate appellant's income tax returns. (R. 218-220.) After examining the store books for several days (R. 221) Root concluded that they were incomplete because they failed to reflect all appellant's dealings with Goodman in 1944. (R. 225-226.) Appellant told Root that he was still unable to recall the Goodman transactions which did not appear on the books. (R. 1168-1169.) Root discovered that appellant's income tax returns were in substantial agreement with the books (R. 227-233), and he therefore asked appellant for a comparative net worth statement. (R. 225.)

[3]These dealings constitute the "Goodman transaction" which looms so large in the record. By them appellant purportedly bought $20.550 worth of cashiers' checks and transferred them to Goodman in return for sailors' suits in the early part of 1944. (R. 195-199, 386-387, 398-415; cf. 795.)

Appellant then went, in the early part of 1948, to D. A. Sargent & Company, a firm of certified public accountants, and told them he wanted an attorney who knew accounting to help him prepare a net worth statement covering the period from 1942 through 1947. He was turned over to Charles R. Ringo, a partner in the firm, who was both an attorney and a certified public accountant.[4] (R. 112-116, 119.) Ringo asked appellant to bring in figures to show his net worth at the end of each year during the period involved (R. 117, 120), and he propounded a series of questions which appellant answered, in part in his own handwriting. (R. 248-253; U.S. Ex. 45.) From the information which appellant brought in and from oral questioning Ringo compiled a preliminary summary of his assets and liabilities at the close of the years from 1941 to 1946, inclusive. This summary (U.S. Ex. 26) and the answers given by appellant to Ringo's written questions (U.S. Ex. 45) show that appellant claimed to have $50,000 cash in the vault as of December 31, 1944. (R. 117, 119-120, 133-136, 148-149, 248-255.)

Ringo also talked to Agent Root, and Root gave him a list of nine cashiers' checks amounting to $20,550. which appellant had sent to Goodman in early 1944, and several invoices showing the subsequent shipment of about $10,000 worth of merchandise from Goodman

[4]The defense objected to any testimony by Ringo as to what he did in preparing the net worth statement. The court ruled that his testimony should be limited to what he did for appellant as an accountant. (R. 112-118.)

to appellant.[5] (R. 123-124, 139-140, 168-169, 1169-1205.) Ringo discussed these Goodman transactions with appellant and found that they had not been recorded in the books. He did not audit the books since the business was carried on largely in cash, and the net worth approach was the only way to determine appellant's true income since the Goodman transaction did not appear on the books. (R. 120-126.) Finally, abandoning his original idea of compiling a comparative net worth statement for each of the years involved (R. 137), Ringo reconstructed, almost entirely from figures supplied by appellant, a statement showing a beginning net worth as of December 31, 1941, and an ending net worth as of December 31, 1947 (R. 117, 119-122, 127-129; see U.S. Ex. 24 printed in Appellant's Opening Brief, Appendix, p. 19), and he prepared a series of schedules in an attempt to reconcile this with appellant's income tax returns for the years involved. (R. 127-129; see U.S. Ex. 25 printed in Appellant's Opening Brief, Appendix, pp. 20-27.)

After Ringo had completed the preliminary draft of the statement appellant told him that he had forgotten to mention a single premium life insurance policy worth over $15,000. When Ringo said that this would throw the statement out of balance, appellant

---

[5]There were no records by which these cashiers' checks and these invoices could be tied together as parts of the same transaction, although appellant later claimed that they were all parts of one deal. Agent Root simply called them to Ringo's attention without any assertion that they were related. (R. 1172-1179, 1195-1197; cf. the prosecutor's explanation of the transaction, R. 1281-1290.)

asked him to omit stock of the Asturias Import and Export Company having a face value of $5,000 on the ground that it was actually valueless and that he did not want to involve his aged mother. Ringo then consulted appellant's attorney, Monroe Friedman, and appellant was told by both of them that nothing could be left out. Appellant did not tell Ringo of any other investment in Asturias. (R. 130-133, 141.) Ringo also testified that in the course of his preparation of the net worth statement he made an inventory of appellant's safe deposit box and saw $20,000 worth of Treasury bonds which were marked as belonging to appellant's mother, Mrs. Mollie Olender, and appellant told him that they did belong to her. This occurred on May 5, 1948. However, Ringo admitted that shortly thereafter he made out appellant's income tax return for 1947 in which the interest on these bonds was reported as the income of appellant. And he admitted that he had also prepared appellant's return for 1948, after the Treasury had begun to investigate with a view to criminal prosecution, and that the interest on the bonds was omitted from that return. (R. 136-138, 150-152, 158-168.)

The beginning and ending net worth statement prepared by Ringo was sworn to by appellant and submitted to Agent Root on September 13, 1948. (See Appellant's Opening Brief, Appendix, p. 19.) Thereafter Root recommended a criminal investigation and Special Agent Whiteside was assigned to the case. (R. 226, 235.) It was discovered that a $10,000 bank

account in the name of appellant's wife, into which he had made substantial deposits, and a further $5,000 investment in Asturias[6] had been omitted from the net worth statement. (R. 143, 236-237, 244-246.) It was discovered that in May 1945 Lewis Leavy sold 200 sailors' suits belonging to appellant to a competitor of appellant named Lerman; that appellant received cashier's checks in the amount of $5,000; and that he entered this amount as capital contribution on the store's books instead of entering it as a sale of stock in hand. There was no other record of this transaction on the books. (R. 189-191, 237-238, 240.) It was further discovered that Leavy had sold other sailors' suits for appellant for which he received $6,000 or $7,000; that at appellant's request Leavy took the money to New York and turned it over to M. Saraga in payment for another shipment of suits to appellant; and that Saraga returned $7,724 to appellant when he was unable to make delivery. This check was deposited in appellant's personal bank account and was not recorded in the store books. (R. 191-194, 207-212, 216-217.)

On the basis of the evidence it had presented the Government submitted a computation of appellant's net worth as of the last day of the years 1944, 1945

[6]Appellant purchased $5,000 worth of stock in Asturias in July 1946. In December 1946 he loaned the corporation $5,000 for which he received stock in July 1947. The December investment, which was made by check, was the one revealed to Ringo. He was not told of the July investment. (R. 74-83, 90-97, 132-133, 141, 147, 155-156, 236-237.)

and 1946. With the exception of a very few items the figures were taken from the stipulation referred to above. (U.S. Ex. 15, see Appellant's Opening Brief, Appendix, pp. 36-39.) The Government allowed $50,-000 as cash in the vault as of the starting point, December 31, 1944. This was based on appellant's statements to Ringo. (R. 247-253.) The Asturias stock and a few non-deductible expenditures not contained in the stipulation were included. Appellant's net worth as of December 31, 1944, the starting point, was computed to be $191,002.07. Upon the basis of the increases in net worth plus the non-deductible expenditures appellant's true income for the years involved was computed. (R. 261-273.) The following table shows the result:[7]

Year	Net Income	Reported	Unreported
1945	$ 88,052.77	$ 41,067.61	$ 46,985.16
1946	48,856.23	23,514.62	25,341.61
Total	$136,809.00	$ 64,582.23	$ 72,326.77

The Government supported the starting point net worth, $191,002.07, by a further calculation. According to appellant's own net worth statement, prepared by Ringo (U.S. Ex. 24, Appellant's Opening Brief, Appendix, p. 19), his net worth as of December 31, 1941, was $138,903.91. For the years 1942, 1943 and

[7]Since appellant's returns were filed on the community property basis, these figures should approximately be halved for the purposes of the indictment.

The basic portion of the Government's computation was incorporated in defendant's Exhibit AK. (See Appellant's Opening Brief, Appendix, p. 28.)

1944 he reported income of $89,431.60 and paid taxes of $16,871.07. This would result in a net worth of $211,464.44 as of December 31, 1944, the starting point, exclusive of living expenses for the years 1942, 1943 and 1944. Allowing $7,000 a year for living expenses, not unreasonable in view of the evidence (R. 107, 171, 173), the resulting figure would be in the neighborhood of $191,002.07. (R. 273-275; cf. 1291-1297.)

The Defense Evidence.—The object of the defense was to show that appellant's net worth was greater at the end of 1944 and less at the end of 1946 than it was according to the Government's computation. The Government's figures for these two dates were $191,-002.07 and $283,193.62. Appellant's figures were $241,-495.06 and $263,578.64. (See Defendant's Ex. AK printed in Appellant's Opening Brief, Appendix, pp. 28-29.) Appellant sought to establish these figures chiefly by establishing his side of the three critical issues mentioned above: (1) that he had $72,039.97 cash in his safe deposit box on December 31, 1944, instead of $50,000 as claimed by the Government; (2) that he was entitled to a credit of $20,550 as of December 31, 1944, on the "Goodman transaction"; and (3) that he held $20,000 worth of bonds belonging to his mother. In addition he sought to show that he had received gifts of approximately $3,000 apiece from his mother and his mother-in-law, Laura Foote, during 1945, and that he had actually paid in cash during 1944 an account of about $5,000 due Money Back

Smith which still appeared on his books as an account payable at the close of 1944.

In the first place, appellant testified that about 1930 his father put a considerable sum of money in a vault for him in Fresno;[8] that each year thereafter until his death in 1940 the father added $5,000 to the sum; and that at the time of the father's death the sum amounted to $75,000 which he transferred to his safe deposit box in Oakland in 1942. (R. 326-336, 345-352, 360-364.) Monroe Friedman, an attorney who frequently advised him and did so in the early stages of this case, made affidavit that he counted the cash in the box on May 5, 1944, and found over $70,000 there at that time. (R. 323-325, 373-377.) Appellant testified to several deposits of cash into the box and numerous withdrawals therefrom during 1944, 1945 and 1946. (R. 751-773.) Hellman, an accountant, then testified as an expert that, on the basis of appellant's testimony as to these cash transactions and on the basis of appellant's testimony that any cash not traceable to other named sources must have come from the safe deposit box,[9] he had reconstructed what must have been the amount of cash in the box on December 31, 1944, and concluded that it must have been $72,039.97. (R. 719-743, 892-902.) Hellman submitted a schedule

[8]Appellant testified that he had about $40,000 of his own around 1920 which he turned over to his father after a quarrel between them. The father later insisted it was appellant's money and put it in the vault for him.

[9]The other sources were the Army and Navy Store, rental property in Fresno, income from stocks and bonds, gifts, and appellant's personal bank account. (R. 751-752, 855.)

summarizing his reconstruction. (See Schedule 4 printed in Appellant's Opening Brief, Appendix, p. 31.) On cross-examination of appellant the Government brought out that in the federal estate tax return for his father's estate it was stated that the father had never made any gifts in excess of $5,000. Appellant admitted he had a good deal to do with the probate of the estate. But he said that he did not know of this particular statement, that he had never been asked about it, and that his sister, who is an attorney and was executrix, did not know of the gifts. (R. 436-452.) He could not recall having given Ringo a statement that he had only $50,000 cash in the box at the end of 1944. (R. 452-460.) And he admitted that he had kept no record showing the deposits in and withdrawals from the safe deposit box. (R. 805.)

Secondly, appellant testified that in January 1944 he withdrew $20,550 from the safe deposit box, purchased a number of cashiers' checks, and gave them to Leavy to buy small size sailors' suits from Goodman. In February and March 1944 Goodman shipped him large sizes which he could not sell, so he put them in the basement and complained to Leavy who promised to try to dispose of them. (R. 386-387, 398-399, 412.) They were not included in the store inventory as of the end of 1944.[10] (R. 387; cf. 395, 626-627.) In June

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[10]This testimony came on the ninth day of the trial, and it came as a distinct surprise to the Government which had relied on the stipulation (see Appellant's Opening Brief, Appendix, p. 36) as stating correctly the amount of appellant's merchandise inventory. The figure used in the stipulation, $85,011.26, appeared on appel-

1945 Leavy sold 200 of the suits to Lerman at cost and appellant deposited the $5,000 in the store account. (R. 399.) In the fall of 1945 Leavy disposed of about 280 more at cost and was told by appellant to turn over the approximately $7,000 he received to Saraga in return for other suits. Saraga was unable to deliver and returned the money to appellant who put it in his personal account. (R. 399-401.) About 20 suits had been sold over the counter during the year. The remaining 322, still in the basement, were finally taken into the inventory at the end of 1945.[11] (R. 401.) Appellant's story of the "Goodman transaction" is summarized in Defendant's Exhibit AL. (See Appellant's Opening Brief, Appendix, pp. 34-35; and see also R. 402-422.) Appellant's story was to some extent corroborated by Leavy (R. 190-197), but Leavy admitted that the statement he sent with the 200 suits sold to Lerman showed that they were mostly *small*

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lant's books, in his California state income tax returns, and in his federal income tax returns. After strenuous objection by the Government the court permitted appellant to testify that he had the Goodman suits at the end of 1944, over and above his recorded and declared inventory, on the ground that what was really involved was a question of appellant's credibility which should be left to the jury. (R. 383-384, 387, 389-395, 407-411, 609-610, 618-643, 665-687.) Appellant testified all the inventories were made solely by himself. (R. 498.)

[11]The inventory showed 322 suits worth $7,889. But 322 suits at $25, the supposed price of the Goodman suits, would be $8,550. When the trial judge pointed out this anomaly, appellant first said there were other suits in the inventory besides the Goodman suits. (R. 405-406.) Somewhat later defense counsel claimed that in making up the inventory appellant had erroneously priced the suits at $24.50. (R. 414-416.) The Government showed that appellant had at times made purchases from other companies at $24.50. (R. 572-573.)

sizes. (R. 190-191, 198.) Lerman, a friendly competitor located almost immediately across the street, testified that these suits, which had been in appellant's basement for over a year, were like gold to him because of the current shortage, and admitted that some of them were small sizes. (R. 1142-1150.) Appellant admitted on cross-examination that none of these suits, allegedly received by him early in 1944, found their way into his records until the end of 1945; and he admitted that there was actually nothing other than his own testimony by which he could tie the 322 suits in the 1945 inventory into the 1944 Goodman purchase. (R. 414, 477, 484, 489-491, 493-495, 502, 779, 789-793; cf. 661-665, 673.)

Thirdly, appellant testified that in 1945 his mother gave him $20,000 with which to buy Government bonds for her. (R. 366-369, 531.) He admitted that, when Ringo prepared his return for 1947, he gave him information that the interest on these bonds was his income, but that a year later he told Ringo to report the interest as his mother's income. (R. 773, 817-821.)

Finally, appellant testified that he received cash gifts of $3,000 from his mother during 1945. He said his mother had drawn the money from her bank accounts and he specified the dates. (R. 427-428, 462-465.) He testified that he had received $3,000 as a gift from his mother-in-law, Laura Foote, during 1945, and that he gave it to his wife to deposit in her bank account. (R. 306, 422-423.) He admitted he knew Mrs. Foote ultimately received an old age pension from the

state (R. 466-470), he admitted that he might have told Ringo that Mrs. Foote gave him the money so she could qualify for a pension (R. 851-854), and he gave conflicting testimony about a check issued to his wife from his own bank account the same day she supposedly deposited the money from her mother in her own account. (R. 846-849.) He testified that during 1944 he paid in cash a $5,000 account due Money Back Smith, but that the account erroneously remained payable on his books at the end of the year. (R. 377-379; cf. 342-344, 826-827.) However, it appeared that the purchases had been made early in 1944 but not entered in the book until December of that year, and appellant could produce no receipt to show his payments. (R. 837-838, 859-862.)

The Government's Rebuttal.—It was shown that most of the withdrawals from the accounts of appellant's mother, which appellant claimed were gifts to him, actually were redeposited in other accounts of his mother or his sister (R. 929-939); that appellant's mother-in-law, Mrs. Foote, applied for an old age pension in 1939 and swore she had no more than $150, that this was supported by investigation, and that appellant's wife submitted a sworn statement in connection with her mother's application in which she stated that she herself had no funds in a safe deposit box at the time[12] (R. 1127-1139); that appellant once

[12]Appellant had testified that the yearly gift of $5,000 which his father placed in the Fresno vault from 1930 to 1940 was intended for both himself and his wife. (R. 529.)

borrowed $30,000, and at another time $10,000, during the period when he allegedly had such a large sum in his safe deposit box (R. 1151-1154, 1206-1208); and that, although some of Goodman's invoices for 1944 had been located, none of them established a tie between the 322 sailors' suits taken into inventory at the end of 1945 and the $20,550 in cashier's checks sent to Goodman in January of 1944, thus leaving that transaction largely dependent on the testimony of appellant alone and indicating that there had been other deals with Goodman which were not entered on the books of the store. (R. 1169-1205.)

SUMMARY OF ARGUMENT.

I.

The evidence adduced by the Government was manifestly sufficient to support the verdict of guilty. What appellant asks is that this Court reweigh the evidence and accept as true his own largely uncorroborated testimony. It is well settled that this Court will view the evidence in the record in the light most favorable to the Government, and that it will not judge the credibility of witnesses or reweigh the evidence.

II.

The pension file of appellant's mother-in-law, Laura Foote, was introduced in rebuttal to show that she could not have made a gift of $3,000 to appellant. The evidence was clearly relevant to the issues, and it was

an official record properly identified by its custodian. The trial court's attention was not called to the confidential nature of the file, and Mrs. Foote, for whose protection the file is declared confidential by California law, was already dead at the time of trial.

III.

Special Agent Whiteside testified that he had examined the records of withdrawals from the accounts of appellant's mother, and he stated that he had found that most of the withdrawals were redeposited in other accounts of the mother. As an expert he could state his opinion that the withdrawals could not possibly have been gifts to appellant. Furthermore in view of the evidence discrediting appellant's story, Whiteside's answer can have had no appreciable effect on the jury.

IV.

The evidence indicates that the relationship of attorney and client never existed between Ringo and appellant. Even assuming such relationship the acts performed by Ringo did not come within the scope of the privilege. His acts were those of an accountant and an agent rather than those of an attorney.

V.

The court's instruction permitting the jury to consider appellant's failure to explain discrepancies between his actual income and his reported income was proper.

ARGUMENT.

I.

THE EVIDENCE WAS AMPLY SUFFICIENT TO SUPPORT THE VERDICT.

Appellant contends that the evidence was insufficient to support the verdict.[13] It is well settled that in considering such an argument this Court will view the evidence in the light most favorable to the Government (*Barcott v. United States,* 169 F. 2d 929, 931 (C.A. 9th), certiorari denied, 336 U. S. 912; *Bell v. United States,* 185 F. 2d 302 (C.A. 4th), certiorari denied, 340 U. S. 930), and that it will not judge the credibility of witnesses or reweigh the evidence. *C-O-Two Fire Equipment Co. v. United States,* 197 F. 2d 489, 491 (C.A. 9th).

We submit that the Government's evidence manifestly supports the verdict of guilty. Appellant's large unrecorded deals with Goodman justified the use of the net worth method in computing his taxable income for the years involved. Moreover, the Goodman deals, considered in conjunction with appellant's addiction to the use of cash and cashiers' checks[14] (R. 1154-1162) and his previous difficulties with the O.P.A. (R. 553-558), indicated a probable black market source for the unreported income. Cf. *United States v. Chapman,* 168 F. 2d 997, 1000 (C.A. 7th), certiorari denied, 335

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[13] In this section of the argument we deal with appellant's first five specifications of error (Br. 72) and the seventh point of his argument (Br. 97-112).

[14] His personal bank account was relatively inactive and he always carried at least $1,000 in his pocket. (R. 854-858.)

U. S. 853. The items in the computation, including the annual inventories of merchandise in the store, were largely derived from the stipulation. In addition to the stipulated items, the Government, relying on appellant's admissions to Ringo in the early stages of the case (Gov. Ex. 26 and Gov. Ex. 45), allowed $50,000 cash in the safe deposit box as of December 31, 1944. And the Government charged appellant with ownership of the $20,000 in Treasury bonds, which were in his possession in 1945 and the income from which he reported as his own for 1947. The Government's computation establishes unreported income amounting to $72,326.77 for 1945 and 1946. Consequently, even if Ringo's evidence were to be rejected and appellant were allowed $72,039.97 cash at the starting point instead of $50,000, the unreported income would still be very substantial. Furthermore, as has been shown in the Statement above, the Government presented independent support of the starting point based on appellant's sworn statement as to his net worth at the end of 1941 and his reported income for 1942, 1943 and 1944. Clearly the prosecution sustained the burden of proof imposed upon it.

Actually, what appellant asks is that this Court reweigh the evidence and accept as true his own largely uncorroborated testimony. Appellant did not know how much cash he had in the safe deposit box as of December 31, 1944, and Hellman's Schedules 4 showing $72,039.97 is admittedly a reconstruction in reliance upon appellant's unsupported testimony as to deposits

and withdrawals of cash. Appellant sought to impeach the stipulated inventory figures by the "Goodman transaction". This again is a reconstruction based on testimony by appellant for which there is no adequate corroboration. The same is true of the $20,000 in Treasury bonds which appellant ascribes to his mother. Throughout the case it was recognized that the critical issue was the credibility of appellant. Defense counsel said at one point, "if the jury believes him, well and good. If they don't that's it." (R. 628; see also 540-541, 620-640.) And just before the closing arguments the trial judge said to counsel, "we come back to my original premise and my original thinking in this case, the beginning and the ending of this case is the credibility of the defendant * * *." (R. 1246.) The prosecutor in summing up the case for the jury cited numerous contradictions and inconsistencies in appellant's testimony (R. 1304-1322) and the jury obviously did not believe his story.

The only reasonable inference to be drawn from the Government's evidence was that of guilt and it was proper to let the case go to the jury. *Remmer v. United States* (C.A. 9th), decided May 28, 1953 (1953 P-H, par. 72,606); *Gendelman v. United States,* 191 F. 2d 993, 995 (C.A. 9th), certiorari denied, 342 U. S. 909; *Curley v. United States,* 160 F. 2d 229, 232-233 (C.A.D.C.), certiorari denied, 331 U. S. 837. The jury has determined appellant's credibility.

II.

THE OFFICIAL FILE ON MRS. FOOTE'S APPLICATION FOR AN OLD AGE PENSION, U.S. EXHIBIT 55, WAS PROPERLY ADMITTED IN EVIDENCE.

Appellant testified that he received about $3,000 from his mother-in-law, Laura Foote, in 1945. In rebuttal the Government introduced the official file, U.S. Exhibit 55, to show that Mrs. Foote had no money and had qualified for an old age pension from the State of California, and to show further that appellant's wife had sworn in 1939 that she had no cash in safe deposit boxes although the sum purportedly set aside by appellant and his wife should have been very large at that time. Defense counsel objected that the file was irrelevant, that it contained hearsay, and that it was evidence of an unrelated offense. (R. 1120-1126, 1230-1231.) Appellant now argues[15] that the file was irrelevant, that it was hearsay, that it was a confidential document under California law and hence incompetent, and that it indirectly forced appellant's wife to testify against him.

The objections to the file are without merit. The evidence was clearly relevant, for the alleged gifts from appellant's mother-in-law and father were intimately connected with the size of his net income for the years involved. This was not impeachment on a collateral issue. The evidence was hearsay, but it was in the form of an official record kept in the regular

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[15]We deal here with appellant's tenth specification of error (Br. 78) and the first point of his argument (Br. 79-85).

course of business and properly identified by its custodian. Appellant did not raise the question of privilege at trial; furthermore, hearsay statements of a wife, admissible under a recognized exception to the hearsay rule, are not limited by the privilege. Wigmore, Evidence (3d ed. 1940), Vol. II, Sec. 604, and Vol. VIII, Sec. 2292. Finally, no point was made at the trial of the confidential nature of the file under California law. The case is altogether different from *United States v. Caserta,* 199 F. 2d 905, 910 (C.A. 3d), upon which appellant relies. In that case the defendant objected to use of his own confidential selective service file in an income tax case. But here, Mrs. Foote, the old-age pensioner for whose protection the file is declared confidential by California law, was long since dead at the time the case was tried.

III.

IT WAS PROPER TO PERMIT SPECIAL AGENT WHITESIDE TO TESTIFY THAT HE HAD DETERMINED THAT CERTAIN ALLEGED GIFTS WERE NOT MADE TO APPELLANT BY HIS MOTHER.

Appellant testified that on several occasions between 1942 and 1945 his mother withdrew funds from her bank accounts and turned them over to him as gifts. In rebuttal Special Agent Whiteside testified that he examined the records of the withdrawals and found that most of them were redeposited in other accounts belonging to appellant's mother or to his sister. He

also said he had discussed the withdrawals with the mother. He was then asked whether, as a result of the discussions and his check of the bank records, he had determined for the purposes of his report whether the money withdrawn was actually a gift to appellant. He replied that he had determined that no gifts had been made. Appellant argues[16] that this was an opinion based on hearsay and that it was highly prejudicial.

Whiteside, testifying as an expert who had examined the bank records, could certainly state his opinion as to whether the withdrawals could possibly have been gifts to appellant. In view of the overwhelming evidence to discredit appellant's story (R. 929-939, 1090-1094, 1101-1102) this particular question and answer can hardly have had any appreciable effect on the jury. Moreover, the amount involved in the alleged gifts was only $10,500, and of this only $6,500 is actually material to the case. (See Appellant's Opening Brief, Appendix, pp. 27, 31.) The argument is obviously without merit.

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[16]We deal here with appellant's ninth specification of error (Br. 77-78) and the second point in his brief (Br. 86-87).

IV.

THE TESTIMONY OF RINGO, THE ATTORNEY-ACCOUNTANT, AND U.S. EXHIBIT 45, THE SERIES OF QUESTIONS PROPOUNDED BY RINGO TO APPELLANT, WERE PROPERLY ADMITTED IN EVIDENCE.

Appellant contends[17] that the testimony of Ringo and U.S. Exhibit 45 should not have been admitted in evidence. Apparently the argument is that appellant went to Ringo because he was an attorney; that the attorney-client relationship arose between them; and that all communications between them relative to appellant's tax matters were, therefore, privileged.

A brief review of the pertinent facts will be helpful. After Agent Root had asked appellant for a comparative net worth statement for the period from 1942 through 1947 (R. 225-227), appellant obtained Ringo's assistance in preparing such a statement. (R. 112-115, 119, 312-313.) Ringo talked to Root and was given a number of items on which Root wanted some explanation. (R. 123, 1176.) Ringo then asked appellant to bring in figures to show his net worth at the close of each of the years involved (R. 117, 120), and he wrote out a series of questions on the particular items which Root wanted explained. (R. 248, 253, 1176-1177.) From the figures appellant brought him and from appellant's oral information Ringo proposed a preliminary statement of assets and liabilities as of the close of the years from 1941 through 1946 (R. 119-120, 133-136;

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[17]We here deal with appellant's sixth, seventh and eighth specifications of error (Br. 72-77) and the third, fourth and fifth points of his argument (Br. 87-95).

U.S. Ex. 26), and he prepared a set of answers to the questions Root had raised.[18] (R. 248-253, 456-460, 1176-1177.) These were shown to the agents by Ringo. (R. 250.) Eventually, Ringo abandoned the idea of a comparative net worth statement for all the years involved (R. 137), and prepared instead a statement showing appellant's beginning and ending net worth as of the end of 1941 and 1947. (R. 117, 119-122, 127-129; U.S. Exs. 24 and 25.)

In the first place, we submit that the attorney-client relationship never existed between appellant and Ringo. When appellant first discovered that he was being investigated he was advised by Reinhard to go to a firm of accountants, D. A. Sargent & Company, and Reinhard mentioned that one of the partners was an attorney and said he thought that would work very well in the picture. (R. 312.) Appellant went first to Sargent, who was an accountant, and was turned over to Ringo, who was an accountant of many years experience and, in addition, an attorney.[19] (R. 113-114, 139-141.) The work that Ringo performed was a typical accountant's function, the compilation of figures in constructing a net worth statement. (R. 117.) When the case began to assume a more serious aspect,

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[18]It is not clear from the record how many of these answers were written out by appellant himself, though by his own admission some of the handwriting on Exhibit 45 was his own. (R. 248-253, 456-460, 1176-1177.)

[19]It is true that appellant testified that he hired Ringo because he wanted an attorney. (R. 423.) But the truth of this statement, since it bore on a question of admissibility of evidence, was a matter for the trial judge to determine.

Monroe Friedman, an attorney who had represented appellant in other matters, was called in, and after Ringo's net forth statement had been completed and submitted to the agents it was Friedman who represented appellant at the subsequent conference. (R. 132, 138, 338, 374, 470, 558, 1115.) The evidence, therefore, indicates that Ringo was hired solely as an accountant, and it is settled that the testimony of an accountant is not privileged. *Himmelfarb v. United States,* 175 F. 2d 924, 938-939 (C.A. 9th), certiorari denied, 338 U. S. 860; *Gariepy v. United States,* 189 F. 2d 459, 463-464 (C.A. 6th).

The sole question is not, as appellant seems to think, whether the relationship of attorney and client existed between Ringo and appellant. The ultimate question is whether the acts which Ringo performed, assuming the relationship, came within the scope of the privilege. There is, of course, no general privilege which renders attorneys incompetent as witnesses. See Wigmore, *supra,* Sec. 2292. The privilege extends no further than to prevent, upon proper objection, the attorney from answering questions as to communications between the attorney and client which can properly be described as confidential. Where the communications involve a mere compilation of figures (R. 117), and where they are made for the very purpose of having them passed on to a third party, there is no basis for the claim of privilege. Wigmore, *supra,* Vol. VIII, Sec. 2311. Here, Ringo was hired for the very purpose of constructing the net worth statement which the

Government had requested. He testified as to the information he received from appellant for that purpose, and he testified as to his work papers, U.S. Exhibits 26 and 45, which he had exhibited to the agents in support of the sworn net worth statement submitted to them.

It is submitted that the trial court's ruling is clearly justified by the recent decision of the Court of Appeals for the Eighth Circuit in *Banks v. United States,* 204 F. 2d 666, 670. That court said:

> It is next contended that the court erred in receiving the testimony of one Joseph A. O'Gordon and Exhibits 70 and 71. Reference to the testimony discloses that O'Gordon representing the defendant in the fall of 1950 discussed with representatives of the Bureau of Internal Revenue some aspects of defendant's business. The revenue officer submitted to O'Gordon a list of questions to which he requested answers. Answers of the defendant were obtained by O'Gordon on a separate sheet of paper and delivered to the revenue agent. O'Gordon was called as a witness by the government and identified the paper containing the list of questions as Exhibit 70 and the paper containing the answers as Exhibit 71. They were received in evidence over the objection of counsel for defendant.
>
> The objection was on two grounds: first, that the lawyer-client relation existed between defendant and O'Gordon and the answers were privileged, and further they were incompetent because they were submitted as part of a proposed settlement of a civil case. O'Gordon at the time in

question was not negotiating with the revenue officer as a mere attorney. He was acting as defendant's agent with a power of attorney. In that capacity he secured defendant's answers to the questions submitted and returned them to the officer. Under these circumstances they were admissible. In *American Fur Co. v. United States,* 2 Peters 358, 364, 27 U.S. 229, 233, the Supreme Court say: "* * * whatever an agent does or says, in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal; and may be proved, as well in a criminal as a civil case; in like manner as if the evidence applied personally to the principal." The testimony objected to here was clearly admissible. *Himmelfarb v. United States,* 9 Cir., 175 F. 2d 924. The information requested was furnished by Banks to O'Gordon for the sole purpose of giving it to McKusick in answer to McKusick's questions. O'Gordon was therefore acting within the scope of his authority as Banks' agent.

See also *Pollock v. United States,* 202 F. 2d 281 (C.A. 5th), certiorari denied, 345 U. S. 993; *Grant v. United States,* 227 U. S. 74; *United States v. DeVasto,* 52 F. 2d 26 (C.A. 2d), certiorari denied, 284 U. S. 678; *United States v. Vehicular Parking,* 52 F. Supp. 751 (Del.); *United States v. Chin Lim Mow,* 12 F.R.D. 433 (N.D. Cal.); *Chapman v. Peebles,* 84 Ala. 283, 4 So. 283.

Appellant also contends (Br. 87-88) that no proper foundation was laid for the admission of U.S. Ex-

hibit 45, the series of questions propounded by Ringo to appellant, in that it was identified only by Agent Whiteside who said that he obtained it from Ringo. However, the existence of the document had just previously been developed by defense counsel in cross-examination of Whiteside (R. 248-253), and defense counsel later introduced as their own a portion of the exhibit not used by the Government. (R. 1169-1172.)

Appellant also contends (Br. 94-95) that defense counsel should have been allowed to ask Ringo whether the relationship of attorney and client existed between appellant and himself. In view of what has been said above of the acts which Ringo actually performed we fail to see how appellant could have suffered prejudice as a result of this ruling.

V.

THE INSTRUCTION PERMITTING THE JURY TO CONSIDER APPELLANT'S FAILURE TO EXPLAIN DISCREPANCIES BETWEEN ACTUAL AND REPORTED INCOME WAS PROPER.

Appellant contends[20] that the burden of proof was shifted to the defense by the following instruction (R. 1392):

> You are further instructed that when in the trial on charges of income tax evasion discrepancies between the defendant's return and his actual income are indicated by the Government's proof, the failure of the defendant to offer ex-

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[20]We here deal with appellant's eleventh specification of error (Br. 79) and the sixth point in his argument (Br. 95-96).

No. 13,658

IN THE

United States Court of Appeals

For the Ninth Circuit

Milton H. Olender, *Appellant,*	
vs.	
United States of America, *Appellee.*	

On Appeal from the United States District Court for the Northern District of California.

APPELLANT'S CLOSING BRIEF.

Leo R. Friedman,
935 Russ Building, San Francisco 4, California,
Attorney for Appellant.

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PAUL P. O'BRIEN

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No. 13,658

IN THE

United States Court of Appeals
For the Ninth Circuit

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On Appeal from the United States District Court for the Northern District of California.

APPELLANT'S CLOSING BRIEF.

An accurate statement of the evidence and of each witness' testimony is contained in our Opening Brief from pages 3-71. The Government's short summary of the evidence contains many misstatements of fact and many statements which are but the mere conclusions of the writer. We here discuss some of these inaccuracies, leaving others to be dealt with in the following arguments.

On page 5 appellee states that appellant, according to his own statement, supervised the maintenance of the books himself, referring to pages 222-4 of the record where Government Agent Root testified that Olender so told him. However, both of the part-time bookkeepers

for Olender testified that Olender did not dictate any bookkeeping policy to them; that Olender was never consulted on how to account for entries nor how to post the books; that Olender did not make any entries in the books nor tell them how to make any such entries. (Testimony of Vera Manger, R. 823-828; testimony of Virginia Busby, R. 842-5.)

On page 17 the Government states that as to the Money-Back-Smith transaction, appellant could produce no receipt to show his payments. The Government makes no reference to the fact that Mr. Lorenzen of the Money-Back-Smith establishment produced the receipted invoices showing payment in 1944 nor to the checks showing payment to have been made in 1944. (Defendant's Exhibits AM and AM-1.)

On page 18 the Government states that appellant borrowed $30,000 and then $10,000 from the bank when he allegedly had large sums in his safe deposit box. The Government fails to mention that the $30,000 loan was made in July of 1945 and the $10,000 loan in August of 1946 (R. 1153-4) or that appellant deposited $32,000 in United States bonds as security for the first loan and $10,000 in United States bonds as security for the second loan.

On page 18 the Government argues that none of the Goodman invoices that were located established a tie between the 322 sailor suits and the $25,550 in cashier's checks sent to Goodman and that this left the transaction largely dependent on the testimony of appellant. Reference is made to pages 1169-1205 of the record. These

pages cover part of the testimony of the Revenue Agent Root. He testified that he had received some Goodman invoices from Special Agent Blanchard in 1948. (R. 1172.) He further testified that he did not know whether the invoices represented the same transactions evidenced by the Goodman cashier's checks (R. 1174) but that he could not say they were not of the same transaction (R. 1174). The Government further argued that this indicated there had been other deals with Goodman which were not entered on the books of the store. There was no evidence to this latter effect and Root's statement that he did not know whether or not the invoices related to the cashier's checks certainly cannot be construed into meaning there was no relation between the invoices and the checks.

On page 19 the Government argues that Agent Whiteside's investigation of appellant's mother's bank accounts showed that most of the withdrawals were redeposited in other accounts of the mother. Appellant testified that he thought the gifts from his mother came from her bank accounts on the specified dates but it may have come from some other source. (R. 464-5.) The record shows that some of these withdrawals were deposited in the bank account of appellant's sister (R. 932, 1101); clearly this indicates that the mother was making equal gifts to her two children.

INSUFFICIENCY OF THE EVIDENCE.

The Government concedes that the chief disputed issues were (1) Whether appellant had $50,000 or $72,000 in cash as of December 31, 1944; (2) Whether appellant was

entitled to a credit of $20,550 in his opening net worth for suits bought from Goodman; and (3) Whether the $20,000 in bonds belong to appellant or to his mother. (Appellee's Brief p. 4.) Despite this concession, the Government argues the sufficiency of the evidence without discussing the evidence as to these three matters.

On page 20 the Government argues as follows:

> "Moreover, the Goodman deals, considered in conjunction with appellant's addiction to the use of cash and cashier's checks (R. 1154-1162) and his previous difficulties with the O.P.A. (R. 553-558), indicated a probable black market source for the unreported income. Cf. *United States v. Chapman,* 168 F.2d 997, 1000 * * *"[2]

The validity of the Goodman transaction was fully established by the Government's own witness. Louis Leavy testified to the entire transaction (R. 190-196); the Government introduced the cashier's checks, payable to Goodman, in the sum of $20,550. Defendant's Exhibit AL (see Appendix, Opening Brief p. 34) traces the entire transaction from the purchasing of the checks to the end. There is nothing in the record to warrant the assumption that appellant was engaged in any black market transaction with Goodman or with Leavy.

The reference to previous difficulties with the O.P.A. refers to a consent judgment for the issuance of an injunction (R. 558) prohibiting the sale of sailor suits in violation of the price established by law. The complaint had

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[2]In *U. S. v. Chapman,* the proof consisted of the testimony of witnesses that the defendant was engaged in black market transactions. There is no such evidence in the instant case.

been filed on November 15, 1943. The decree was entered by stipulation wherein it was recited that defendant Olender claimed any violations were unintentional. (R. 556.) There was no evidence that the injunction had ever been violated. The presumption of innocence applies and it must be presumed that Olender obeyed the injunction.

In footnote 14 the Government states "His (Olender's) personal bank account was relatively inactive and he always carried at least $1,000 in his pocket." The prosecutor argued this point to the jury (R. 1324) to the effect that there was something fishy about the whole business because his personal bank account was very inactive and did not show the payment of ordinary current personal expenses. However, the books of Olender's business were introduced in evidence. (Defendant's Exhibits H to L.) These showed that throughout the times involved practically all personal living expenses were drawn on the business account and charged to Olender's personal account, including such items as laundry, cleaner, creamery, gas and electric, auto license, lodge dues, telephone, flowers, life insurance, charitable donations, etc., etc.

Following the foregoing, the Government's brief merely contains a statement of ultimate figures without discussing how or in what manner they were arrived at. In fact, the Government's entire argument as to the sufficiency of the evidence only occupies three pages of its brief.

THE COURT ERRED IN ADMITTING IN EVIDENCE THE FILE RELATING TO MRS. FOOTE'S APPLICATION FOR AN OLD AGE PENSION.

The Government admits that this file was hearsay (Appellee's Brief p. 23), but seeks to justify its admission on the ground that it was an official record kept in the regular course of business and that appellant did not raise the question of privilege at his trial. We know of no law that permits the introduction of hearsay testimony merely because it is contained in an official record. As pointed out on page 80 of our opening brief, this file, in addition to the affidavit of appellant's wife, contained reports of investigators for the Welfare Department, reports from banks relative to lack of deposits from Laura Foote, affidavits of Laura Foote showing no personal property in excess of $500, etc. The introduction of these documents constituted the rankest of hearsay and prevented appellant from cross-examining any of the makers thereof. (*Hanfelt v. United States* (8 Cir.), 253 Fed. (2d) 811.)

The fact that certain documents are found in a file of some public official or agency does not make such documents admissible under the public record rule. This question was recently before the California Appellate Court in the case of *Pruett v. Burr* (decided May 27, 1953), 118 A.C.A. 217, which involved documents found in the custody of a public officer. The California Appellate Court at page 229 states:

> "In *Everts v. Matteson,* 68 Cal.App.2d 577 (157 P. 2d 651), it was held that a communication from a person who had been employed to appraise realty was not a corporate record, under Civil Code, section 371,

nor was it admissible in evidence merely because the employer had it among his papers.

In *City of Stockton v. Vote,* 76 Cal. App. 369, 396 (244 P. 609), it is said: 'No section of the Political Code relating to the department of public works has been called to our attention that would make the report by a subordinate officer or field officer to his superior, or whatever designation may be applicable to the position occupied by Mr. Barnes, a public document admissible in evidence in controversies between independent parties. These considerations show the opinions and statements of Mr. Barnes to be mere hearsay so far as this case is concerned and wholly inadmissible.'

In 20 American Jurisprudence, page 866, section 1027, it is remarked that: '* * * a record of a primary fact made by a public official in the performance of official duty is, or may be made by legislation, competent prima facie evidence as to the existence of that fact, but records of investigations and inquiries conducted either voluntarily or pursuant to requirement of law by public officers concerning causes and effects, and involving the exercise of judgment and discretion, expressions of opinion, and the making of conclusions, are not admissible in evidence as public records.' "

In discussing the Uniform Business Records Act, the California Court at page 230 stated:

"We do not believe that it was the intent of the act to make all correspondence received by a businessman admissible in evidence merely because it might pertain to his business. If this were so, any written hearsay evidence concerning business matters would be competent evidence."

In answering our contention that the affidavit of appellant's wife was improperly admitted, the Government urges that appellant did not raise the question of "privilege" at his trial. The question of "privilege" is not involved. The question involved is one of disability and competency. Under the federal law a wife is not competent to testify against her husband in a criminal case. The Government refers to Section 604 of Volume 2 of Wigmore on Evidence in support of the statement that "hearsay statements of a wife, admissible under a recognized exception to the hearsay rule, are not limited by the privilege". Just what the Government means by this language does not appear in its brief. There was no question of "privilege" involved. Said Section 604 reads in part as follows:

> "The doctrine of *waiver* applies exclusively to privilege, a disability cannot be waived. One spouse, therefore, cannot by any attempted waiver be enabled to call for the favoring testimony of another."[1]

But whether the disability of a wife to testify against her husband falls under the heading of incompetency or privilege is immaterial. Appellant did not waive any objection to the introduction of his wife's affidavit in evidence.

When the file was first offered, the prosecutor stated that it contained the affidavit of appellant's wife and that

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[1]Professor Wigmore wrote the foregoing before the Supreme Court held that a wife was competent to testify as a witness for her husband but the Section shows that the relationship of husband and wife renders one incompetent to be a witness against the other in a criminal case.

it was offered to impeach appellant's testimony that gifts were made to appellant and his wife jointly. (R. 1122.) There was thus before the Court the direct statement of the prosecutor that the Government was offering and going to rely upon incompetent testimony. Appellant objected on the grounds that the whole matter was hearsay and the Court should have sustained the objection.

In the case of *New England etc. Co. v. Bonner* (2 Cir.), 68 Fed. (2d) 880, 881, the Court said:

> "The rule of practice in the federal courts requiring a specific statement of the grounds of objection to the admission of testimony is not to be so applied as to require redundancy. Objections of the kind taken here are sufficient where the ground therefor is so manifest that the trial court and counsel cannot fail to understand it. *Grandison v. Robertson* (C.C.A.) 231 F. 785; *Safford v. United States* (C.C.A.) 233 F. 495."

As the Government could not call Betty Olender to testify against her husband, they could not rely on a hearsay affidavit made by appellant's wife. The Government could not indirectly do that which the law prohibited it from doing directly. (70 *C. J.*, p. 140, Sec. 170, and cases cited.)

The Government attempts to distinguish the case of *United States v. Caserta*, 199 Fed. (2d) 905, upon which appellant relies by stating that Caserta objected to the use of his own confidential file whereas in the instant case Mrs. Foote was dead. The fact that Mrs. Foote was dead cannot justify the admission in evidence of her hearsay statements and declarations.

The admission of the entire file was most prejudicial to appellant. As was so often stated throughout the trial, the guilt or innocence of appellant depended upon the credibility the jury would accord to his testimony. Anything the Government offered to destroy appellant's credibility before the jury must have operated to his great prejudice. If this file had been excluded from evidence the Government could not have based its arguments thereon that appellant was a liar and unworthy of belief and the jury may have given far greater credence to appellant's testimony with the result that a different verdict may have been returned to the Court.

THE COURT ERRED IN INSTRUCTING THE JURY IT COULD CONSIDER APPELLANT'S FAILURE TO EXPLAIN DISCREPANCIES BETWEEN ACTUAL AND REPORTED INCOME.

This matter was argued by us on pages 95 and 96 of our opening brief. The Government seeks to uphold the giving of this erroneous instruction by quoting from the opinion in *Bell v. United States,* 185 Fed. (2d) 302, 309, where the same language as used in the complained of instruction is found in the opinion of the Court.

The Government is in error in assuming that because language appears in a Court's decision, it is proper to incorporate such language in an instruction to the jury. The rule in this regard was early stated by the California Supreme Court in the case of *Davis v. Hearst,* 160 Cal. 143, 195, 116 P. 530, as follows:

> "In the Dauphiny case it is pointed out that 'it is always injudicious to take the language of a court,

in discussing a proposition of law, as correct instruction to be given to a jury.' This is necessarily so, for it is always proper and frequently imperative upon a court of review, in answering arguments pro and con, itself to indulge in argumentative discussion, which is appropriate to the question under consideration, but has no place in an instruction to a jury."

See, also:

People v. Darnell, 107 Cal. App. (2d) 541, 549, 237 P. (2d) 525.

The foregoing rules are fully applicable to the question now presented. In the *Bell* case the Court's opinion was an argument dealing with the sufficiency of the evidence and the same is true of the other two cases cited by the Government on page 32 of its brief. As an argument it may be sound but as an instruction to the jury it is error. The mere fact that *discrepancies are indicated* by the Government's proof neither shifts the burden of proof nor the burden of going forward to the appellant. If all that the Government's case established was an indication of discrepancies, then the Government failed to carry its burden of proof and appellant was entitled to a judgment of acquittal.

The fact that the Court instructed the jury that the burden of proof rested on the Government cannot cure the error for, by the given instruction, the Court in effect told the jury if discrepancies between appellant's returns and his actual income were merely indicated by the Government's proof and unexplained by appellant, that this justified the jury in finding that the burden of proof had

been fully sustained by the Government. Pertinent language will be found in the case of *Bihn v. United States*, 328 U.S. 633, 637, 90 L.Ed. 1484, 1488, as follows:

> "Or to put the matter another way, the instruction may be read as telling the jurors that, if petitioner by her testimony had not convinced them that someone else had stolen the ration coupons, she must have done so. So read, the instruction sounds more like comment of a zealous prosecutor rather than an instruction by a judge who has special responsibilities for assuring fair trials of those accused of crime."

So, here, the jury were in effect told that if such discrepancies were merely indicated by the Government's proof and unexplained by the appellant, the jury would be justified in finding the appellant guilty.

THE COURT ERRED IN ADMITTING THE TESTIMONY OF THE WITNESS RINGO.

The Government's statement of the facts relating to this problem (pp. 26-7) is not accurate. A correct summary of the evidence involved in this point is set forth in our opening brief at page 89.

The Government states that Ringo talked to Agent Root and was given a number of items on which Root wanted some explanation and pages 123 and 1176 of the record are cited in support of this statement. On page 123 Ringo testified that Mr. Root merely wanted the Goodman transactions and on page 1176 Mr. Root testified that he told Ringo that he wanted to know about the Goodman trans-

actions. Nothing on these pages shows that Root gave Ringo "a number of items on which Root wanted some explanation".

The Government then states that Ringo wrote out a series of questions on the particular items which Root wanted explained and reference is made to pages 248, 253 and 1176-7 of the record. There is nothing on the cited pages to support this statement. It is true that Ringo testified that he asked Olender to submit to him figures as to his net worth. (R. 117.)

Appellee contends that the relationship of attorney and client never existed between Ringo and appellant. The facts as stated on page 27 of its brief do not correctly present the situation. Olender testified that he went to his banker and wished to get an accountant who was also a tax attorney (R. 423); that Reinhard said he knew such a man and referred him to the Sargent firm, of which one member was a tax attorney and an accountant (R. 423-4); that when he appeared at the office, the name of Charles Ringo, attorney at law, was painted on the door; that he had a conversation with Ringo; that he told Ringo he wanted an attorney as well as an accountant and as such he had certain information that he desired to give him; that he retained Ringo and carried on with him all of his tax matters; that the reason he wanted an attorney and an accountant combined was that in his net worth statement there were many items he didn't wish disclosed. (R. 425-6.)

Mr. Ringo testified that he was an attorney and an accountant; that his business card read "CPA, attorney-

at-law" (R. 116); that Olender first asked him if he was an attorney-at-law and that he wanted an attorney-at-law who knew something about accounting; that after he had told appellant he was an attorney and knew both subjects, that appellant retained him (R. 116); that he was a specialist in tax matters and he was employed to look into Olender's tax problems (R. 118).

The Government in footnote 19 merely states that appellant testified that he hired Ringo because he wanted an attorney and omits all other evidence on the subject. Appellant's testimony as to his retaining Ringo is fully corroborated by the testimony of Reinhard and Ringo.

The Government contends that Ringo performed merely an accountant's function; such is not the case. While the preparation of the net worth statement may be classified as an accountant's function, it does not follow that the information given by Olender to Ringo is free of the attorney-client relationship and privilege. For example:

A man has acquired money and funds in violation of criminal statutes. He has filed a yearly return omitting such amounts. Later he desires to file an amended return including such amounts and employs an attorney-accountant to advise him and to do the same upon the understanding that his explanation to the attorney as to the illegal manner in which he acquired the money is to remain confidential. An amended return is so prepared. Clearly the lawyer-accountant can testify as to the preparation of the return and that he acquired the figures from his client but he cannot disclose the confidential communications made to him as to the manner in which the client obtained the money.

So, in the instant case, Ringo could testify to preparing the net worth statement and that the information was acquired from Olender, but the confidential communications made by Olender to Ringo as to the sources of the income or the manner in which it was acquired could not be testified to by Ringo over the objection of appellant.

The Government seeks to argue that because Monroe Friedman was consulted at later stages of the proceedings, this indicates Ringo was only hired as an accountant and not as a lawyer. A man may have two lawyers. The record shows that the bringing in of Mr. Friedman was due to the fact that a dispute arose between Ringo and appellant as to the omission of certain items from the net worth statement. Mr. Friedman was called in as an arbitrator of this question.

On pages 29 and 30 the Government relies on certain cases, each of which is clearly distinguishable from the case at bar.

In *Banks v. United States,* 204 Fed. (2d) 666, the facts show that O'Gordon, the lawyer-accountant, discussed certain matters with the Bureau of Internal Revenue and the Revenue Officer submitted a list of questions to which he requested answers. O'Gordon procured these answers from his client and delivered the same to the revenue agent. O'Gordon was acting as the defense agent under a power of attorney and the questions and answers were made with knowledge that they were to be delivered to the Government. The Court held that as O'Gordon was acting under a power of attorney and that his client furnished the information for the purpose of its being given

to the revenue agent, that the claim of privilege could not be sustained.

In the instant case Ringo was not acting under any power of attorney nor as the agent of Olender for the purpose of transmitting to the Government any communications made by Olender to Ringo, save and except the net worth statement.

Pollock v. United States, 202 Fed. (2d) 281, and *United States v. DeVasto,* 52 Fed. (2d) 26, were cases where the attorney was merely acting as a scrivener for the preparation of deeds transferring property. The Court held that under such circumstances the attorney was not acting in his professional capacity; that the matters were those which were to be made public and not kept private, and furthermore that the transference of the property in each case was part of a criminal conspiracy.

Grant v. United States, 227 U.S. 74, was a contempt proceeding. Corporate records had been turned over to an attorney who refused to produce them in response to a subpoena. The Court held that as the documents were corporate records, they were not confidential communications and therefore the lawyer could not legally refuse to obey the subpoena.

In *United States v. Chin Lim Mow,* 12 F.R.D. 433, a subpoena *duces tecum* had been issued to an attorney to produce certain bank accounts. The evidence showed that the attorney was not acting in his professional capacity but merely as a trustee for the handling of the bank account, the making of deposits and withdrawals.

The Government has failed to cite one case that meets the situation now presented. Here Ringo was employed as an attorney upon the understanding that the information as to the items to be contained in the net worth statement were to be held in confidence.

THE COURT ERRED IN ADMITTING IN EVIDENCE GOVERNMENT'S EXHIBIT 45.

Appellee's sole argument in support of the Court's ruling admitting United States Exhibit 45 in evidence is as follows (pp. 30-31):

> "Appellant also contends (Br. 87-88) that no proper foundation was laid for the admission of U. S. Exhibit 45, the series of questions propounded by Ringo to appellant, in that it was identified only by Agent Whiteside who said he obtained it from Ringo. However, the existence of the document had just previously been developed by defense counsel in cross-examination of Whiteside (R. 248-253), and defense counsel later introduced as their own a portion of the exhibit not used by the Government. (R. 1169-1172.)"

This document had been given to Whiteside by Ringo. Ringo never identified it in any manner. It was Ringo's statement to Whiteside that the questions thereon had been answered by appellant.

On cross-examination of the Government's witness Whiteside he was being questioned as to whether he used the figures in Monroe Friedman's affidavit in making his

computations. (R. 247.) Whiteside answered: "Mr. Olender gave to Ringo a statement showing cash on hand as of the beginning of this period and how it was disposed" (R. 248),[3] and then stated that Ringo told him he had outlined a series of questions for Olender, among them being how the cash was disposed, that Olender answered in his handwriting by stating at the end of '44 he had $50,000 left (R. 248-9). On *redirect examination* by the Government, Whiteside testified that Ringo had given him the copy of such document. (R. 250.) Item 19 was then admitted in evidence over the objections of appellant. (R. 252.)

Long after the portion of the document had been so admitted in evidence and when Agent Root was being cross-examined, appellant sought to show that certain data contained therein was not supplied by Olender but was in fact given to Ringo by Root (this was to refute Whiteside's testimony that all answers were given by Olender in his handwriting). Root answered that he had given that information to Ringo (R. 1170), whereupon appellant offered in evidence that portion which Root said he had given Ringo.

The foregoing presents an entirely different situation from the one presented in the Government's brief. Appellant's offer was to establish certain facts that had been ascertained by Agent Root and not to adopt any portion of the exhibit as being the statements of Olender.

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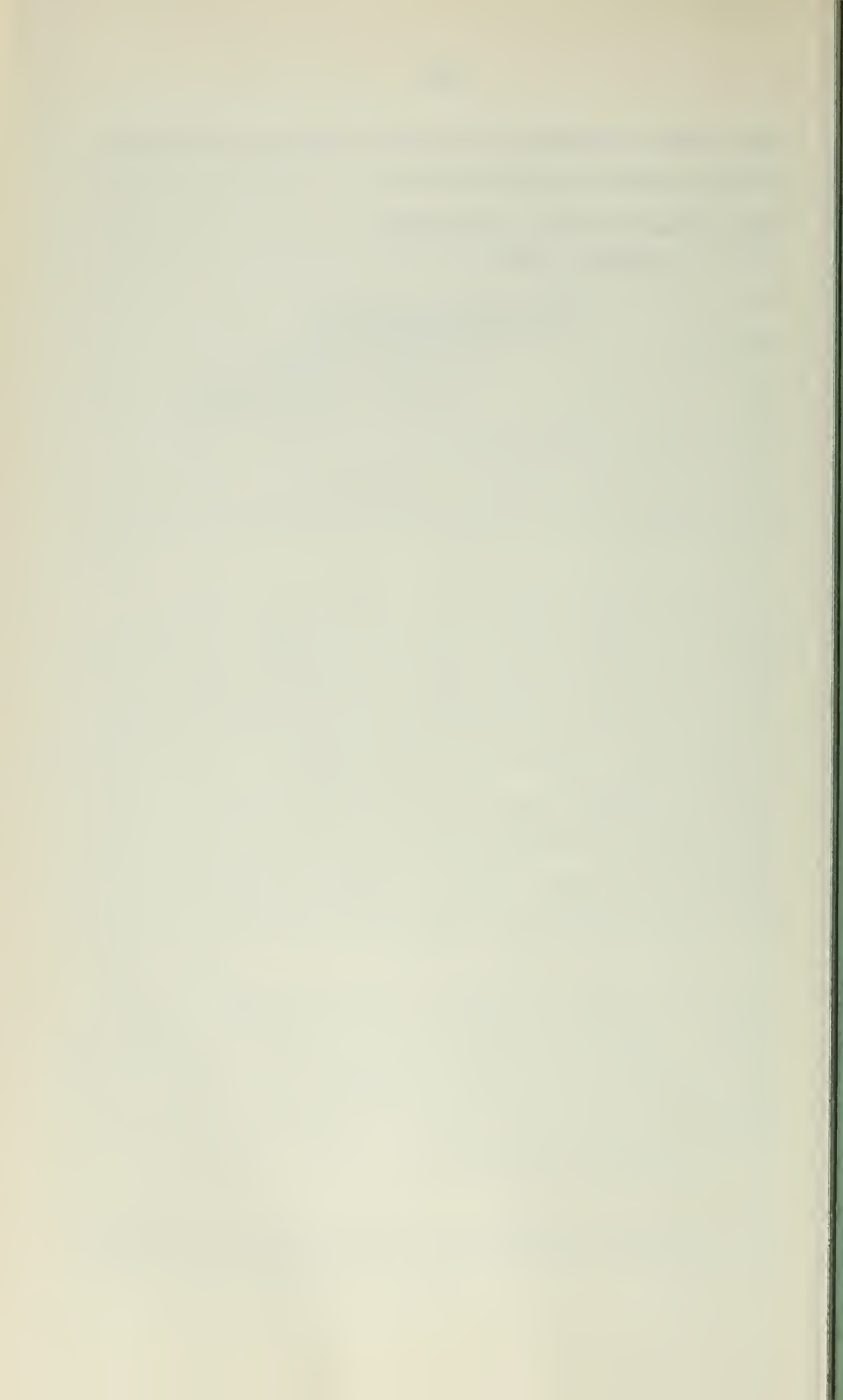
[3]Appellant moved to strike out the answer of Whiteside. The Court denied the motion. (R. 248.)

Item 19 of the exhibit was never identified as being the writing or statement of appellant.

Dated, San Francisco, California,
October 26, 1953.

Respectfully submitted,
Leo R. Friedman,
Attorney for Appellant.



No. 13,659

IN THE

United States Court of Appeals

For the Ninth Circuit

FARMLAND IRRIGATION COMPANY, INC., a corporation,
Appellant,

vs.

GEORGE DOPPLMAIER,
Appellee.

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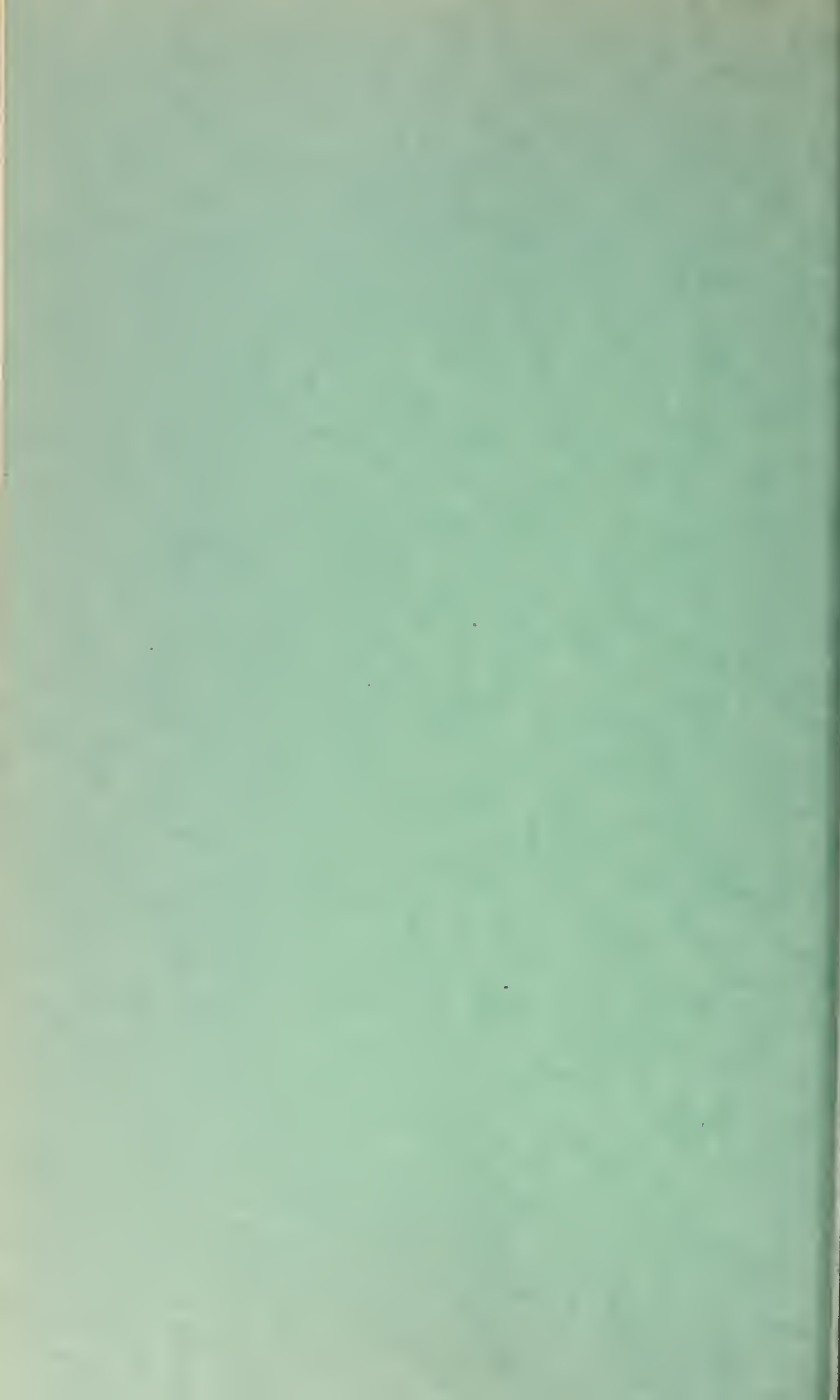

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No. 13659

IN THE

United States Court of Appeals

For the Ninth Circuit

FARMLAND IRRIGATION COMPANY, INC., a corporation, *Appellant*, vs. GEORGE DOPPLMAIER, *Appellee.*	

Brief for Appellant

This is an appeal of an applicant for intervention in an action for the recovery of royalties alleged to be due under a patent license agreement; the United States District Court for the District of Oregon having denied appellant's motion for leave to intervene.

JURISDICTIONAL STATEMENT

The Complaint in this action, denominated a "Claim for Accounting and Other Relief" (Record, page 3) alleged the plaintiff George Dopplmaier to be a citizen of the State of California and the defendant Stout Irrigation, Inc. to be an

Oregon corporation; and further alleged "that the controversy between plaintiff and defendant involved in this litigation is a sum in excess of $3,000.00 exclusive of interest and costs" (Record, p. 4).

The Answer (Record, p. 15) admitted the allegations of the Complaint as to the citizenship of the parties (Record, p. 16) and admitted that the plaintiff claimed a sum in excess of $3,000.00 exclusive of interest and costs (Record, p. 17).

The District Court therefore acquired original jurisdiction under the provisions of Title 28, U. S. Code, § 1332(a)(1) providing that the District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000.00 exclusive of interest and costs and is between citizens of different states.

Subsequent to the filing of the Complaint by the plaintiff George Dopplmaier and the filing of the Answer of the original defendant Stout Irrigation, Inc., appellant Farmland Irrigation Company, Inc. filed a "Motion to Intervene as a Defendant" (Record, p. 18), basing its motion on that part of Rule 24, Federal Rules of Civil Procedure, reading as follows:

> "(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: * * * (a) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action: * * *."

Thereafter, on November 10th, 1952, the United States District Court entered an order denying this Motion to Intervene (Record, p. 36).

The jurisdiction of this Honorable Court arises under Title 28, U. S. Code, § 1291; the aforesaid denial of appellant's Motion to Intervene being a final adjudication because the case is one in which the right to intervene is absolute as distinguished from one in which the action of the District Judge will be viewed as discretionary.

U. S. v. Philips, Judge, 107 Fed. 824 (C.A. 8); (1901).

STATEMENT OF THE CASE

On December 5th, 1949 one Darrel C. Mansur, of Newberry, California, entered into a "License Agreement" (Record, pp. 5-15) with Stout Irrigation, Inc., an Oregon corporation, granting the latter a license to make and sell certain irrigation apparatus. Plaintiff George Dopplmaier, appellee here, is the assignee of the rights of said Darrel C. Mansur under said agreement (Complaint, Par. III, Record, p. 3; Answer, Par. III; Record, p. 16).

A dispute having arisen between said George Dopplmaier and Stout Irrigation, Inc. as to the amount of royalties due under said agreement, Dopplmaier, on June 6th, 1951 (Record, p. 34), filed a Complaint in the U. S. District Court for the District of Oregon denominating the same a "claim for accounting and other relief" (Record, pp. 3-5). On October 8th, 1951 (Record, p. 34) the defendant Stout Irrigation, Inc. filed its Answer (Record, pp. 15-17).

Thereafter, on May 22nd, 1952, Farmland Irrigation Company, Inc., a California corporation, the appellant here, filed a "Motion to Intervene as a Defendant" (Record, p. 18) supported by an affidavit of J. M. Kroyer, its vice-president (Record, pp. 19-20), setting forth that on February 1st, 1952 said Farmland Irrigation Company, Inc. by contract

acquired all of the assets of Stout Irrigation, Inc., the original defendant in this action, and bound itself contractually to assume all of the liabilities of the said Stout Irrigation, Inc., including any liability which might be adjudged against Stout Irrigation, Inc. in this action.

It was further alleged in the "Motion to Intervene as a Defendant" and supporting affidavit of Kroyer that by reason of such facts and of the dissolution of the defendant Stout Irrigation, Inc., the representation of the interest of Farmland Irrigation Company, Inc., the applicant for intervention, by the existing party Stout Irrigation, Inc., would be inadequate (Record, p. 18); that Farmland Irrigation Company, Inc. was a corporation duly organized and existing under the laws of California and duly qualified to do business in the State of Oregon; and that it had acquired the assets and assumed the liabilities of Stout Irrigation, Inc. with the object of constituting itself the successor of Stout Irrigation, Inc. and of carrying on the business of manufacturing and selling sprinkler irrigation equipment previously carried on by Stout Irrigation, Inc., which it has since actively done and expected to continue so to do (Record, p. 20).

By an order entered November 10th, 1952 (Record, pp. 27-28), the District Court denied the Motion to Intervene.

A "Motion of Intervening Defendant to Dismiss" (Record, p. 26) was filed in behalf of Farmland Irrigation Company, Inc. concurrently with its Motion to Intervene and based on the ground that, it being an indispensable party to the action, its intervention as a defendant would destroy the previously existing diversity of citizenship, causing the court to lose jurisdiction to proceed in the action and requiring a

dismissal. This motion was treated by the District Court as contingent upon allowance of the Motion to Intervene and as becoming moot with its denial. Therefore, as appears from the District Court's order of November 10th, 1952 (Record, pp. 27-28) and the docket entry of that date (Record, p. 36), no order was entered either granting, denying or dismissing the said "Motion of Intervening Defendant to Dismiss."

Questions Presented.

The present appeal presents two questions:

1. Is appellant entitled to intervene in this action as a matter of right?
2. Does the jurisdiction of the District Court survive the intervention sought?

SPECIFICATIONS OF ERROR

The errors relied upon and urged on this appeal are as follows:

1. The District Court erred in denying Appellant's Motion to Intervene as a Defendant in this action.
2. The District Court erred in declining to rule upon Appellant's Motion to Dismiss this action.

SUMMARY OF ARGUMENT

1. Appellant is entitled to intervene in this action as a matter of right because:

(a) The representation of the applicant for intervention by the existing defendant, Stout Irrigation, Inc., is and will be inadequate, because Stout Irrigation, Inc. has no interest in defending the action in

view of the contractual assumption of all of its liabilities by Appellant, including any liability which might be adjudged against said Stout Irrigation, Inc. in this action;

(b) The applicant for intervention will be bound by a judgment in the action by its contractual assumption of the liabilities of Stout Irrigation, Inc.; and

(c) The provisions of Rule 24(a) of the Federal Rules of Civil Procedure provide for intervention *as a matter of right* under the circumstances set forth in points (a) and (b) above.

2. The jurisdiction of the District Court does not survive this intervention, because:

(a) The applicant for intervention, Farmland Irrigation Company, Inc., is an indispensable party to this action, because a decree made in the absence of Farmland Irrigation Company, Inc. as a party would have a manifest injurious effect on the interest of such absent party.

(b) Jurisdiction is dependent upon diversity of citizenship.

ARGUMENT

First Point

The first point urged on this appeal is that the petitioner for intervention is entitled to intervene *as a matter of right.*

THE REPRESENTATION OF THE INTEREST OF APPLICANTS FOR INTERVENTION BY EXISTING PARTIES IS AND WILL BE INADEQUATE.

The record shows, without contradiction, that the applicant for intervention, Farmland Irrigation Company, Inc. has acquired the assets and assumed the liabilities of the

original defendant Stout Irrigation, Inc. with the object of constituting itself the successor of that company and of carrying on the business of manufacturing and selling sprinkler irrigation equipment previously carried on by that company, and that it has since actively carried on that business and expects to continue to do so (Record, p. 20).

A party claiming to have succeeded to the interest of an existing party to an action and without representation of its own interest in the case is entitled to intervene as a matter of right. *This is true even though the succession occurred after the institution of the action in which intervention is sought.*

Deauville Associates, Inc. v. Eristavi-Tchitcherine, 173 Fed.(2d) 745 (C.A. 5; 1949).

THE APPLICANT FOR INTERVENTION WILL BE BOUND BY A JUDGMENT IN THE PRESENT ACTION.

The record shows, without contradiction, that the petitioner for intervention, Farmland Irrigation Company, Inc., has bound itself contractually to assume all of the liabilities of the original defendant Stout Irrigation, Inc., including any liability which may be adjudged against that corporation in this action (Record, p. 19).

A judgment against a defendant who has a right of action to recover over against a third party is conclusive upon the latter provided he has notice and a full opportunity to defend. This is true whether the right of action arises by operation of law or, as here, by express contract.

Washington Gaslight Co. v. District of Columbia, 161 U.S. 316, 329; 16 S.Ct. 564; 40 L.Ed. 712.

Thus in an action by a subcontractor against the surety on a general contractor's bond, the general contractor may in-

tervene as a defendant since it would be bound by a judgment against its surety entered after it had received notice of the suit and it was entitled to an opportunity to defend. Furthermore, a counterclaim is allowable without independent jurisdiction where it is based on the same contract on which the original plaintiff sued.

U. S. ex rel. Foster Wheeler Corp. v. American Surety Co., 142 Fed.(2d) 726 (C.A. 2; 1944).

RULE 24(a) FRCP PROVIDES FOR INTERVENTION AS A MATTER OF RIGHT UNDER THESE CIRCUMSTANCES.

The pertinent provisions of Rule 24(a) of the Federal Rules of Civil Procedure applicable to this situation read as follows:

> "(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; * * *."

Second Point

The second point urged on this appeal is that the jurisdiction of the Court does not survive this intervention, because the intervenor is an indispensable party and a citizen of the same state as plaintiff, and the jurisdiction is dependent upon diversity of citizenship.

THE APPLICANT FOR INTERVENTION, FARMLAND IRRIGATION COMPANY, INC. IS AN INDISPENSABLE PARTY.

Unless it can be affirmatively held that the decree sought in the present case would, in the absence of Farmland Irrigation Company, Inc. as a party have no injurious effect on the interest of the applicant for intervention, then the applicant for intervention is an "indispensable" party.

In *State of Washington v. United States*, 87 Fed.(2d) 421, 427, this Court set up the following criteria to be applied in determining whether an absent party is indispensable:

> "After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) *Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party?* (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?
>
> "If, after the court determines that an absent party is interested in the controversy, it finds that all of the four questions outlined above are answered in the affirmative with respect to the absent party's interest, then such absent party is a necessary party. However, *if any one of the four questions is answered in the negative, then the absent party is indispensable.*" (Emphasis added.)

Since it has been shown above that the original defendant Stout Irrigation, Inc. has a right of action under its contract with Farmland Irrigation Company, Inc. to recover over against the latter and that Farmland Irrigation Company, Inc. has had notice of the present action and sought by this petition for intervention a full opportunity to defend it, any judgment rendered against Stout Irrigation, Inc. herein would be conclusive upon Farmland Irrigation Company, Inc.

> *Washington Gaslight Co. v. District of Columbia, supra*, 161 U.S. 316, 329; 16 S.Ct. 564; 40 L.Ed. 712.

Under these circumstances it obviously cannot be affirmatively asserted that a decree made in the absence of Farmland Irrigation Company, Inc. as a party would have no injurious effect on the interest of that party. Therefore, under the circumstances, Farmland Irrigation Company, Inc. must be regarded as an indispensable party.

THE REQUIRED INTERVENTION DESTROYS THE JURISDICTION AND REQUIRES DISMISSAL OF THE ACTION.

The record shows that the plaintiff, George Dopplmaier, appellee here, and the party Farmland Irrigation Company, Inc. petitioning for leave to intervene as a defendant, are citizens of the same state. The Complaint (Record, p. 3) alleges that plaintiff George Dopplmaier is a citizen of the State of California. The affidavit of J. M. Kroyer supporting the Motion to Intervene as a defendant, states (Record, p. 20) that Farmland Irrigation Company, Inc., is a corporation duly organized and existing under the laws of the State of California. As appears from the jurisdictional statement in this brief (ibid, pp. 1-2), the jurisdiction of the District Court herein is based solely upon diversity of citizenship and amount in controversy. Thus, the intervention of an indispensable party will destroy the necessary diversity of citizenship and result in a loss of jurisdiction.

It was established at an early date that the absence in an action of indispensable parties requires dismissal of an action.

> *State of California v. Southern Pacific Co.,* 157 U.S. 229; 39 L.Ed. 683.

This basic rule has been applied to situations such as the present one in which an indispensable party petitions to

intervene and in such situations it has been held that where, upon proper alignment of the intervenor as a plaintiff or defendant his citizenship destroys the previously existing diversity of citizenship, the District Court loses jurisdiction to proceed in the action.

Kentucky Natural Gas Corp. v. Duggins, 165 Fed. (2d) 1011 (C.A. 6).

"When Federal jurisdiction is grounded on diversity of citizenship such diversity of citizenship must exist between all the plaintiffs on the one hand and all the defendants on the other. If the person is an indispensable party to the action it is necessary that he be made a party to the suit either as a plaintiff or a defendant, and he will be aligned by the Court in accordance with his real interest in the controversy, even though such an alignment may destroy the necessary diversity of citizenship and result in a loss of jurisdiction. Schuckman vs. Rubenstein et al., 164 F.(2d) 952, CCA 6th, decided December 12, 1947; Farr. v. Detroit Trust Company, 116 F.(2d) 807, 811, CCA 6th; Baltimore and Ohio R.R. Co. v. Parkersburg, 268 U.S. 35. Compare Atwood v. National Bank of Lima, 115 F.(2d) 861, CCA 6th. In the application of this rule parties to an action are classified as (1) formal parties, (2) necessary but not indispensable parties, and (3) indispensable parties, who are defined as 'Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.' Shields, et al. v. Barrow, 17 Howard, 130; Minnesota v. Northern Securities Co., 184 U.S. 199, 246; Schuckman v. Rubenstein, et al., supra, CCA 6th.

These well settled rules are applicable when an intervening petition makes new parties to an action over which the Court has previously acquired jurisdiction by reason of diversity of citizenship. If the new parties so brought into the action are not indispensable parties jurisdiction continues to exist. Wichita R. & Light Co. vs. Public Utilities Commission, 260 U.S. 48; Stewart v. Dunham, 115 U.S. 61. However, if the intervening petition is not one merely ancillary to the main action, such as asserting a right in property or a fund in possession of the Court, and brings into the action an indispensable party, and upon proper alignment his citizenship destroys the previously existing diversity of citizenship, the District Court loses jurisdiction to proceed in the action. Kendrick v. Kendrick, 16 F.(2d) 744, CCA 5th; Forest Oil Co. v. Crawford, 101 F. 849, CCA 3d; Johnson v. Riverland Levee District, 117 F.(2d) 711, CCA 8th, Annotation 134 A.L.R., 335, 351 through 355; Charleston National Bank v. Oberreich, 34 F. Supp. 329, E.D. Ky. See also Wichita R. & Light Co. v. Public Utilities Commission, supra, at p. 54; Galbraith v. Bond Stores, 4 F.R.D. 319, W.D. Mo."

"The judgment of the District Court is reversed, and the action remanded to that court for the entry of a judgment dismissing the action without prejudice, unless jurisdiction can be shown by amended pleadings."

CONCLUSION

It is submitted to be unequivocally clear that appellant has established its right to intervene in this case and that the Order of the District Court denying its Motion to Intervene should be reversed.

The disposition of the subsidiary question as to the survival of jurisdiction depends upon the discretion of this Court. The District Court has not ruled upon the Motion to Dismiss. If the decision of this Court is limited to reversal of the Order denying the Motion to Intervene, the District Court will be required to rule upon the Motion to Dismiss. This may result in a second appeal on substantially the same record.

It is submitted therefore that important economies of time and effort will be effected if this Court either directs a dismissal of this action at this stage or, at the least, expresses its views on the merits of the Motion to Dismiss.

Dated, March 20, 1953.

Respectfully submitted,

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No. 13659

United States Court of Appeals
For the Ninth Circuit

FARMLAND IRRIGATION COMPANY, INC., a corporation,

Appellant,

vs.

GEORGE DOPPLMAIER,

Appellee.

Brief for Appellee

Appeal from the United States District Court for the District of Oregon.

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FILED
MAY 4 1952
PAUL P. O'BRIEN
CLERK

HOUGNTON-CARSON COMPANY, PRINTERS

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No. 13659

United States Court of Appeals
For the Ninth Circuit

FARMLAND IRRIGATION COMPANY, INC.,
a corporation,

Appellant,

vs.

GEORGE DOPPLMAIER,

Appellee.

Brief for Appellee

Appeal from the United States District Court for the District of Oregon.

This is appellee's brief in answer to the brief of appellant, applicant for intervention in an action for the recovery of royalties alleged to be due under a patent license agreement; the United States District Court for the District of Oregon having denied appellant's motion for leave to intervene.

STATEMENT OF THE CASE

The statement of the case by the appellant in its Brief for Appellant, pp. 3, 4, and 5, is adopted by the appellee with the following corrections, additions and restatements of facts:

On December 5, 1947, Darrell C. Mansur, patentee of certain irrigation apparatus, entered into a license agreement with Stout Irrigation, Inc., whereby certain rights to manufacture and sell said apparatus were granted the latter (Transcript of Record, pp. 3, 4, 5). Stout Irrigation, Inc., agreed to pay royalties under said license agreement in the amount of 3% of the sum received from licensed sales (Transcript of Record, p. 4). Plaintiff George Dopplmaier is the assignee and owner of the letters patent issued to Mansur, and by reason of Dopplmaier's ownership as assignee of said patent and the patent rights appertaining thereto, Stout Irrigation, Inc., must pay any royalties that may be due under the license agreement to Dopplmaier (Transcript of Record, pp. 3, 4).

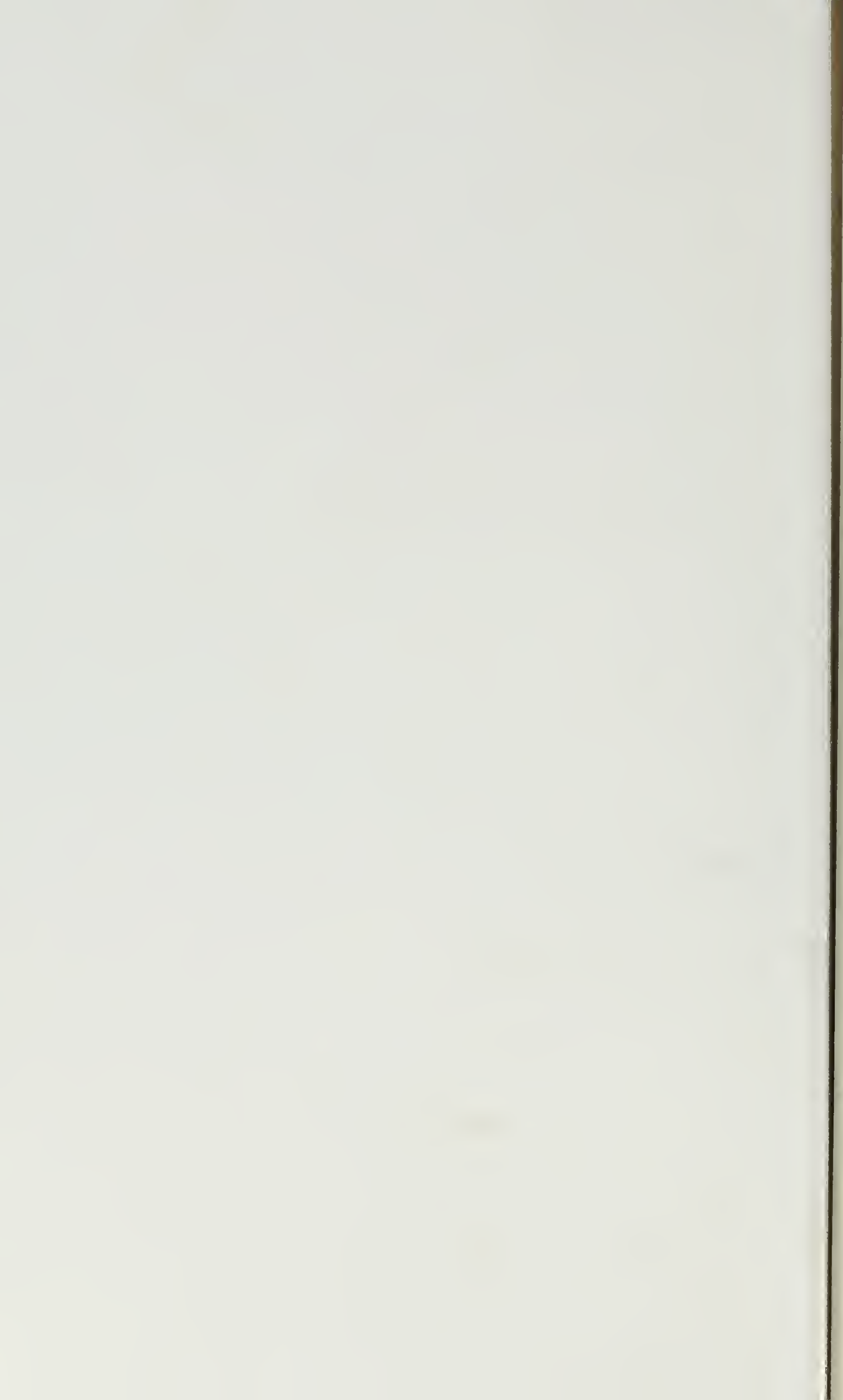
The sequence of events outlined by the appellant leading to its Motion to Intervene will be restated herein for purposes of greater clarity. It is as follows:

1. June 6, 1951—Dopplmaier filed a complaint in the U. S. District Court for the District of Oregon against Stout Irrigation, Inc., for unpaid royalties (Transcript of Record, pp. 3, 4, 5, 34).

2. October 8, 1951—Stout Irrigation, Inc., filed its answer (Transcript of Record, p. 34).

3. February 1, 1952—Affidavit of J. M. Kroyer sets forth that on February 1, 1952, Farm-

Appellant sets forth in its Counterclaim that on or about, to wit, the 31st day of January, 1952, Stout Irrigation, Inc., was dissolved, and all of its assets were distributed to its several stockholders; that thereafter, on or about, to wit, the 1st day of February, 1952, appellant acquired from said stockholders all of the assets of Stout Irrigation, Inc., and entered into a contractual obligation pursuant to which it assumed all of the obligations of Stout Irrigation, Inc., and became the successor to its business (Transcript of Record, pp. 23, 24).



land Irrigation, Inc., by contract acquired all of the assets of Stout Irrigation, Inc., and bound itself contractually to assume all the liabilities of the latter (Transcript of Record, p. 19).

4. May 23, 1952—Farmland Irrigation, Inc., filed a Motion to Intervene, and a Motion to Dismiss (Transcript of Record, p. 35).

The above sequence of events points out that Farmland Irrigation, Inc., appellant herein, had no relationship to Plaintiff George Dopplmaier and Defendant Stout Irrigation, Inc., of any kind until over three and one-half months had elapsed from the date the answer was filed by the Defendant Stout Irrigation, Inc., in the U. S. District Court for the District of Oregon.

An additional fact that appellee presents is that the same attorneys, namely, L. R. Geisler and Theodore H. Lassagne, represent both the Defendant Stout Irrigation, Inc., and Farmland Irrigation, Inc., appellant herein, which seeks to intervene as a Defendant (Transcript of Record, pp. 17, 18, 19, 25, 26, 27, 28, 32, 33).

ARGUMENT

I. Intervention as a matter of right.

The first point urged by the appellant is that it is entitled to intervene *as a matter of right* in the case of *George Dopplmaier, Plaintiff, vs. Stout*

Irrigation, Inc., an Oregon Corporation, Defendant (Brief for appellant, pp. 5, 6). The appellant predicates its alleged right of intervention upon the provisions of Rule 24 (a) of the Federal Rules of Civil Procedure. The appellant asserts the applicability of Rule 24 (a) by contending that the representation of its interest by the existing defendant, Stout Irrigation, Inc., is and will be inadequate, and that it will be bound by a judgment in the action of *George Dopplmaier v. Stout Irrigation, Inc.* (Brief for appellant, pp. 5, 6).

In order to analyze properly the validity of appellant's claim of right to intervene, Rule 24 (a) of the Federal Rules of Civil Procedure will be set forth, together with a discussion of its scope and relevancy to the facts of this case.

Rule 24 (a) states, in pertinent part, the following:

> "Upon timely application anyone shall be permitted to intervene in an action: * * * (2) When the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; * * *"

Essential to an absolute right of intervention in accordance with Rule 24 (a) is a showing by the applicant for intervention that *both the conditions* stated by the Rule, namely, inadequate representation by existing parties *and* a judgment that is or

may be binding in the action, exist. A showing that an applicant for intervention will be bound by a judgment in the action is not in itself sufficent to confer upon such applicant a right to intervene; it must also be shown that representation of the applicant for intervention's interest by existing parties is or may be inadequate.

> *MacDonald v. United States,* 119 Fed. (2d) 821, 827 (C.A. 9; 1941);
>
> *Tachna v. Insuranshares Corporation of Delaware, et al.,* 25 Fed. Supp. 541, 542 (District Court 1; 1938).

It is clear that representation of the appellant's interest by the existing party, Stout Irrigation, Inc., is adequate. Argument will now be directed to this point.

In support of its argument that it will be bound by a judgment in the action of *George Dopplmaier vs. Stout Irrigation, Inc.,* the appellant states the following (Brief for appellant, p. 7):

> "A judgment against a defendant who has a right of action to recover over against a third party is conclusive upon the latter provided he has notice and a full opportunity to defend. This is true whether the right of action arises by operation of law or, as here, by express contract.
>
> *Washington Gaslight Co. v. District of Columbia,* 161 U.S. 316, 329; 165 S. Ct. 564; 40 L. Ed. 712."

Accordingly, if appellant is to be bound by a judgment in the action, it will be so bound only by reason of notice and full opportunity to defend. Since the appellant, without becoming a formal party to the record, would have a full opportunity to present all of its defenses by reason of notice and an opportunity to defend the action, it inevitably follows that representation of the appellant's interest by the existing party will be adequate. Hence there would be no right to intervene under Rule 24 (a). This principle is well stated in *Washington Gaslight Co. v. District of Columbia, supra,* to the following effect:

> "In *Boston v. Worthington,* 10 Gray, 496, 498, 499, the language of the court in *Littleton v. Richardson,* 34 N.H. 187, 66 Am. Dec. 759, was quoted and adopted:
>
> " 'When a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency of the suit, and requested to take upon him the defense of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, *and has the same means and advantages of controverting the claim as if he were the real and nominal party upon the record.* In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not.'
>
> * * *

> "The foregoing rulings are supported by many decided cases. * * *" (Emphasis ours.)

On the other hand, if appellant were not given notice and a full opportunity to defend, it would not be bound by a judgment in the action, and would have no right to intervene under Rule 24 (a). Thus the position of the appellant must be either that it has had notice and a full opportunity to defend, in which case it has no right to intervene since it may present all of its defenses and accordingly its interest will be adequately represented by the existing party; or that it has not received notice and a full opportunity to defend, in which case it has no right to intervene since it will not be bound by a judgment in the action.

Additionally, none of the criteria which establish inadequacy of representation is present in the case at bar. In *Kind et al. v. Markham,* 7 F.R.D. 265, 266 (District Court 2; 1945), the Court approved the following criteria for determining the adequacy of representation of an applicant for intervention's interest by existing parties:

> "In Moore's Federal Practice, §24.07, at page 2333, it is stated that 'Inadequacy of representation is shown if there is proof of collusion between the representative and an opposing party, if the representative has or represents some interest adverse to that of petitioner, or fails because of nonfeasance in his duty of representation.' The cases seem to support this."

Applying these criteria, the Court disallowed intervention by remaindermen of a trust in a suit brought by the trustees against the Alien Property Custodian for a return of stock to the trust. In rebuffing the contention that the representation of the remaindermen by the trustees might be inadequate, the Court stated the following:

> "There is no charge here of fraud or collusion. The interests of the plaintiffs and the applicants are identical; and the plaintiffs are the mother and brother of the applicants. In fact, the plaintiffs have filed an affidavit herein urging the granting of the motion."

In the case at bar, there is clearly no inadequacy of representation based upon the above standards. There is no charge of fraud or collusion. The identity of interest of the appellant and its representative, Stout Irrigation, Inc., is strikingly manifested by the fact that the attorneys who represent Stout Irrigation, Inc., namely, Theodore H. Lassagne, and L. R. Geisler, are also the attorneys for the appellant (Transcript of Record, pp. 17, 18, 19, 25, 26, 27, 28, 30, 32, 33). Since the same attorneys represent both Stout Irrigation, Inc., and the appellant, and since both Stout Irrigation, Inc., and the appellant set forth identical Answers (Transcript of Record, pp. 15, 16, 17, 20, 21, 22), it is clear that the same defense will be presented whether or not the appellant is a formal party to the record. In the face of these

facts it is a certainty that appellant's interest is adequately represented, since appellant's attorneys are conducting the defense of Stout Irrigation, Inc., and are defending on the same grounds as set forth by the appellant in its Answer.

Concerning the impact of a common attorney for both the party to the record and an applicant for intervention on the right to intervene, *McAvoy v. United States,* 178 Fed. (2d) 353 (C.A. 4; 1949), held that among the reasons for a bankrutcy court denying leave to apply for intervention by the United States in a pending Federal District Court suit was the fact that the interest of the United States was represented by its Justice Department acting as attorney for a party to the record in said pending suit.

Certainly a charge of non-feasance on the part of Stout Irrigation, Inc., is not and cannot be made by the appellant. In fact the Docket Entries (Transcript of Record, pp. 34, 35, 36) reveal that the attorneys for Stout Irrigation, Inc., and the appellant have diligently pursued the defense of the action on behalf of Stout Irrigation, Inc. Thus inadequacy of representation is not established in terms of the criteria set forth in *Kind et al. v. Markham, supra.*

In summary, representation of appellant's interest by the existing party, Stout Irrigation, Inc., is adequate and hence appellant cannot intervene under Rule 24 (a) for the following reasons: (a)

The appellant, in order to be bound by a judgment in the action, as it alleges it will be, must have received notice and a full opportunity to present all its defenses; (b) There is no collusion between Stout Irrigation, Inc., and George Dopplmaier; (c) The identity of interest between the appellant and Stout Irrigation, Inc., and the fact that the appellant will have his defenses presented are additionally established by the presence of appellant's attorneys in the action as the attorneys of Stout Irrigation, Inc.; (d) The Docket Entries reveal that Stout Irrigation, Inc., has vigorously defended the action instituted against it by George Dopplmaier.

II. Applicant for intervention as an indispensable party, and termination of federal jurisdiction.

The appellant urges in its second point that jurisdiction of the Court would not survive the alleged right to intervene, because the purported intervenor is an indispensable party and a citizen of the same state as the plaintiff, and jurisdiction is dependent upon diversity of citizenship.

Since the argument of appellee presented in I negatives the right of appellant to intervene, it is submitted that a consideration of appellant's second point is unnecessary to a disposition of this case. However, the appellee will now direct argument to the contention that appellant is an indispensable party.

Rule 19 (a), Federal Rules of Civil Procedure, states the following with respect to necessary joinder of parties:

> "(a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff."

Whether or not a party must be joined as an indispensable party in accordance with Rule 19 (a) is determined by reference to state law. This principle is succinctly stated in *County of Platte v. New Amsterdam Casualty Co.,* 6 F.R.D. 475 (District Court 8; 1944) as follows at page 482:

> "Subdivision (a) of Rule 19 deals with the necessary joinder of indispensable parties and is declaratory of the law as it previously existed with respect to who are indispensable parties. Under such previously existing law, the indispensability of parties depended upon state law.
> * * *
>
> "The Court will therefore look to the law of Nebraska in determining whether W. L. Boettcher, or his representatives, are necessary or indispensable parties to the instant actions."

The cases of *Young v. Garrett,* 149 Fed. (2d) 223, 228 (C.A. 8; 1945) and *Kroese v. General Steel Cast-*

ings Corporation et al., 179 Fed. (2d) 760, 761, 762 (C.A. 3; 1950) are to the same effect.

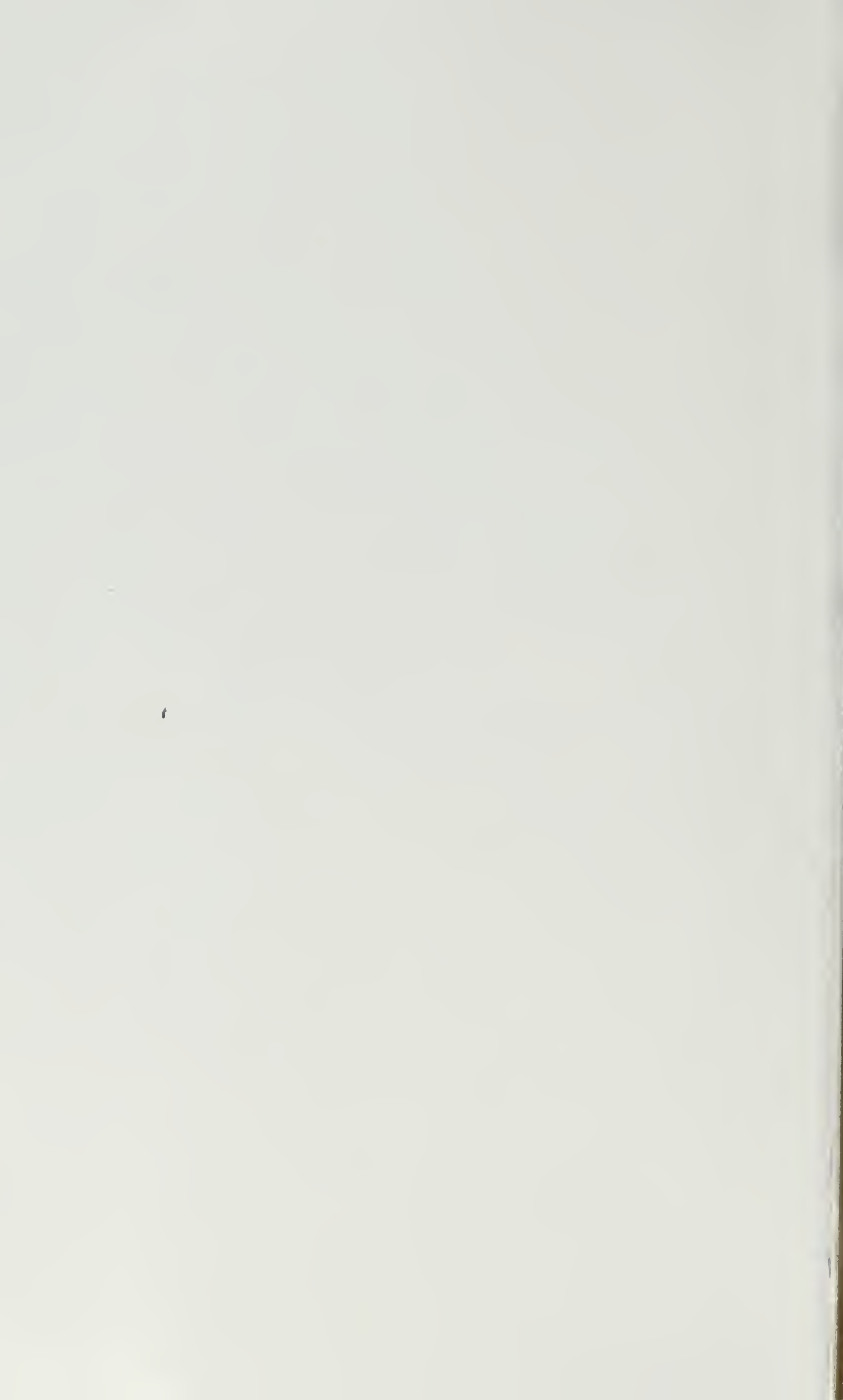
Under Oregon law, it is clear that the appellant could be sued by the plaintiff as a third party creditor beneficiary by reason of the agreement to assume the liabilities of Stout Irrigation, Inc. (Brief for appellant, pp. 3, 4).

> *Umpqua Valley Bank v. Wilson,* 120 Or. 396;
>
> *Erickson v. Grande Ronde Lumber Co.,* 162 Or. 556, 568.

Erickson v. Grande, supra, at page 586, further establishes as Oregon law the principle that a creditor beneficiary can elect to sue either the original debtor or the party who has assumed the original debtor's obligation:

> "From Restatement of the Law, Contracts, § 141, we quote:
>
> " '(1) A creditor beneficiary who has an enforceable claim against the promisee can get judgment against either the promisee or the promisor or against each of them on their respective duties to him. Satisfaction in whole or in part of either of these duties, or of judgment thereon, satisfies to that extent the other duty or judgment.'
>
> "The principle embraced in the Restatement represents the law of this state."

Since, as the excerpt from *Erickson v. Grande, supra,* holds, a promisor who has assumed the obligation of the promisee and who is in privity of contract with said promisee need not be made a party in a suit by the creditor against the promisee, certainly much less could it be argued that an assuming promisor be made a party defendant, where, as is true in this case, the promisor, appellant herein, has not entered into a contract with defendant Stout Irrigation, Inc., of any kind whatsoever, but rather for its own reasons has chosen affirmatively not to enter into privity of contract with said Stout Irrigation, Inc.



Thus a creditor beneficiary is not compelled to join the original debtor and the party who has assumed the liability in the same action, but rather can proceed to judgment against either one. Accordingly, when suit is instituted against the original debtor, as in the case at bar, the party who assumed the liability, namely, the appellant, is not in Oregon an indispensable party. Hence appellant need not be joined as an indispensable party under Rule 19 (a).

The following cases further assert the proposition that parties as to whom joinder is not required by state law are not indispensable in a federal action: (1) In *County of Platte v. New Amsterdam Casualty Co., supra,* it was held that the principal obligor was not indispensable in a suit against the sureties on a bond inasmuch as the obligation of the principal and sureties was joint and several and state law allowed a suit against the surety alone; (2) In *Greenleaf v. Safeway Trails,* 140 Fed. (2d) 889 (C.A. 2; 1944), a joint obligor was held not indispensable in a suit brought against the other obligor, particularly in view of the New York statutes which permitted a joint obligor to be sued separately; (3) In *Young v. Garrett, supra,* certain tenants in common were held not indispensable parties in a suit by one tenant in common for recovery of land and damages thereto in view of a state court decision allowing a tenant in common to sue individually.

The appellee submits that the above argument is decisive in resolving the issue of indispensability against the appellant. However, the appellee will now consider the four criteria used in determining party indispensability alluded to by the appellant (Brief for appellant, p. 9) as set forth in *State of Washington v. United States,* 87 Fed. (2d) 421, 427, with reference to their applicability to the case at bar:

> "(1) Is the interest of the absent party distinct and severable?"

The controversy in the action of *George Dopplmaier vs. Stout Irrigation, Inc.,* relates to royalties allegedly due to Dopplmaier from Stout as a result of an agreement entered into between these two parties (Brief for Appellant, p. 3). The appellant had no part in said agreement. Accordingly, whether or not an obligation is due and owing to Dopplmaier from Stout must be determined solely between Dopplmaier and Stout and without reference to appellant in any manner. It therefore follows that the interest of appellant is distinct and severable from the controversy.

> "(2) In the absence of such party, can the court render justice between the parties before it?"

Since the appellant is in no way relevant to a determination of whether royalties are due to

Dopplmaier from Stout, it is clear that a fair adjudication of the controversy between the parties can in no manner be affected by his absence.

> "(3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party?"

In the case of *Samuel Goldwyn, Inc., v. United Artists Corporation,* 113 Fed. (2) 703 (C.A. 3; 1940), "interest" is defined as follows at page 707:

> "We conclude that the 'interest' referred to both in Rule 19 and the decided cases is one which must be directly affected legally by the adjudication."

If the appellant has received no notice or opportunity to defend the action, any decree made therein will not injuriously affect any interest it may have since the decree will not bind the appellant, *Washington Gaslight Co. v. District of Columbia, supra,* and consequently the appellant's interest could not be directly affected legally by the adjudication. If the appellant has received notice and an opportunity to defend the action, it cannot be regarded as an absent party, though not a formal party to the record, since it has the same means and advantages of controverting the claim and presenting its dedefenses as if it were a formal party to the record.

> *Washington Gaslight Co. v. District of Columbia, supra.*

A decree made under such facts would not be made in the absence of appellant.

> "(4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?"

From the discussion of (1), (2), and (3), it is apparent that a final determination in the absence of the appellant as a formal party to the record will be consistent with equity and good conscience.

Relative to a termination of federal jurisdiction, it is uncontroverted that the appellant, not being an indispensable party, could in no manner cause such termination, but that jurisdiction would continue to exist.

> *Wichita Railroad & Light Company v. Public Utilities Commission of The State of Kansas,* 260 U.S. 48, 54;
>
> *Kentucky Natural Gas Corporation v. Duggins,* 165 Fed. (2d) 1011, 1015 (C.A. 6; 1948).

Additionally, the facts reveal that the Complaint in the action of *George Dopplmaier v. Stout Irrigation, Inc.,* was filed June 6, 1951 (Transcript of Record, p. 34); the Answer in said suit was filed October 8, 1951 (Transcript of Record, p. 34); and on February 1, 1952, the appellant bound itself contractually to assume the liabilities of Stout Irrigation, Inc., as consideration for its assets (Transcript

of Record, pp. 19, 20). It therefore follows that the appellant assumed the liabilities of Stout after the complaint and answer in the action had been filed, and after federal jurisdiction based on diversity of citizenship had been fully acquired by the Court. The issue is therefore presented as to whether federal jurisdiction can be defeated by an event which occurs subsequent to the vesting of jurisdiction and which is occasioned by a voluntary act.

The answer is clear that under circumstances such as these federal jurisdiction continues to exist. In *Cohen v. Maryland Casualty Co.,* 4 Fed. (2d) 564 (District Court 4; 1925), the principal is stated as follows at page 567:

> "The general rule is that, when the jurisdiction of the federal court has once attached, it is not subject to be divested by subsequent events, or extraneous matters."

In *Hardenbergh v. Ray,* 151 U.S. 112, an ejectment action was instituted in the federal court by a citizen of New York against tenants in possession of the land, all citizens of Oregon, federal jurisdiction being based on diversity of citizenship. The landlords, on their own motion, were substituted as parties in place of the tenants. One landlord was a citizen of New York. The contention was made that federal jurisdiction terminated because of lack of diversity of citizenship. The court overruled the contention stating the following at page 118:

> "This objection is without merit * * * when the original suit was brought against * * * the persons in possession, the court acquired jurisdiction of the controversy, and no subsequent change of the parties could affect that jurisdiction."

The case of *Porto Rico v. Ramos,* 232 U.S. 627, holds to the same effect.

In the case of *Jarboe v. Templer,* 38 Fed. 213, the court held that in a suit on a claim by a citizen of Missouri against a citizen of Kansas, in which federal jurisdiction based on diversity of citizenship existed, a purchase of the claim by a citizen of Kansas and his presence as a party would not destroy federal jurisdiction. *Sternberger v. Continental Mines, Power & Reduction Co.,* 259 Fed. 293 (Colorado; 1919) held that on a sale of the property in controversy in a pending suit to a citizen of the same state as the opposite party, federal jurisdiction based on diversity of citizenship remained though the buyer was made a party to the suit. The contention was advanced in the Sternberger case that where a subsequent party of the same citizenship as the opposite party is created by operation of law, jurisdiction continues after substitution; but where such a subsequent party exists by reason of a voluntary act of a party, jurisdiction is lost. The court rejected this specific contention and found that jurisdiction continued. *Glover v. Shepperd,* 21 Fed. 481, holds the same effect.

It is thus the law that the appellant, assuming Stout Irrigation, Inc.'s, liabilities after federal jurisdiction attached, could not under any view defeat jurisdiction based upon diversity of citizenship.

CONCLUSION

It is submitted to be unequivocally clear that appellant has no right to intervene under Rule 24 (a), Federal Rules of Civil Procedure; that appellant is not an indispensable party; and that appellant could in no manner terminate federal jurisdiction by defeating diversity of citizenship.

The Order of the District Court denying the motion to intervene should be affirmed.

Respectfully submitted,

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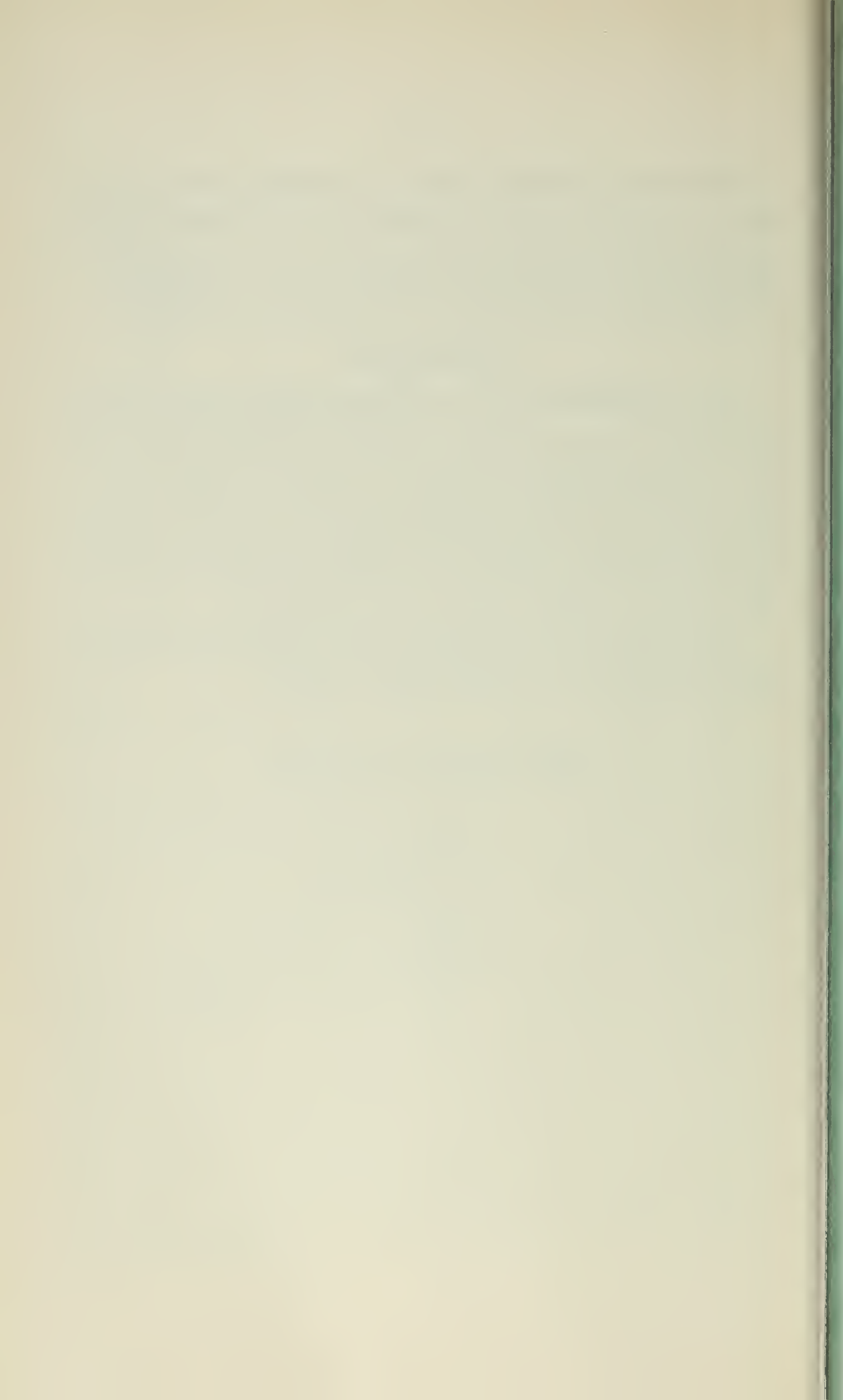
Attorneys for Appellee.



No. 13,659

IN THE

United States Court of Appeals

For the Ninth Circuit

Farmland Irrigation Company, Inc., a corporation,

Appellant,

vs.

George Dopplmaier,

Appellee.

Reply Brief for Appellant

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FILED

MAY 11 1953

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No. 13,659

IN THE

United States Court of Appeals

For the Ninth Circuit

FARMLAND IRRIGATION COMPANY, INC., a corporation,

Appellant,

vs.

GEORGE DOPPLMAIER,

Appellee.

Reply Brief for Appellant

The present reply will be limited to the principal question of Appellant's right to intervene in this action as a matter of right.

The subsidiary question as to the survival of jurisdiction, as pointed out in the conclusion of the Brief for Appellant (p. 13), depends upon the discretion of this Court, and since the Court is not required to decide it, it will not be further discussed herein.

The Brief for Appellee cites the appearance of the same attorney for both Stout Irrigation, Inc. and Farmland Irrigation Company, Inc. as evidence that Farmland Irrigation Company, Inc. is *represented* in the present action, citing *McAvoy v. United States,* 178 Fed.(2d) 353 (C.A. 4; 1949) in support of this contention. In that case it appears that a bankruptcy court denied leave to apply for intervention by the United States in a pending Federal District Court suit for the reason, *inter alia,* that the interest of the United States was represented by its Justice Department acting as attorney for a party to the record in the pending suit. Obviously, the Justice Department of the United Staes is incapable of acting in the interest of any party but the United States. It has but one client. If it *appears* in the record of a case acting as attorney for a party, it is still *representing* its one client, the United States.

On the contrary, any lawyer not in the employ of the United States may simultaneously *appear* in behalf of a plurality of parties so long as their interests are not in conflict. However, his *appearance* in behalf of a plurality of parties in the same suit is no basis whatever for concluding that the interest of one party in behalf of whom he appears is *represented* at all by the other party. His *appearance* for both means nothing more than that the interests of the parties whom he separately *represents* are not in conflict.

That this distinction between "appearance" and "representation" is not "a distinction without a difference" will be evident from a consideration of the counterclaim contained in the proposed pleading of Farmland Irrigation Company, Inc. filed with its Motion to Intervene as a Defendant in this

action and appearing in the Record at pages 22 to 25, inclusive. This counterclaim presents a justiciable controversy, based upon the assertion of Farmland Irrigation Company, Inc. that it is the successor of Stout Irrigation, Inc., which was not and could not have been placed in issue on the original Complaint and Answer. It is for the purpose of securing adjudication of this issue that Farmland Irrigation Company, Inc. seeks to intervene here, since it could not have secured adjudication of that issue even by openly and avowedly controlling the defense of Stout Irrigation, Inc. in the original action.

Its right to intervene for that purpose is further supported by the case of *Deauville Associates, Inc. v. Eristavi-Tchitcherine*, 173 Fed.(2d) 745 (C.A. 5; 1949) cited in the Brief for Appellant (p. 7), and none of the cases cited in the Brief for Appellee (involving situations in which beneficiaries of a trust sought to intervene in an action to which the trustee representing them was a party) are in any way relevant to this situation.

Additionally, however, the Court's attention is invited to the case of *Innis, Speiden & Company et al. v. Food Machinery Corporation; Brogdex Company of California, Ltd., intervenor,* 2 F.R.D. 261; 53 U.S.P.Q. 330, in which Circuit Judge Biggs, sitting as a District Judge, upheld the right of a territorial exclusive licensee under a patent to intervene in an infringement action instituted by the patent owner, holding that the interest of the territorial exclusive licensee was inadequately represented by the patent owner solely because the acts of infringement relied upon by the plaintiff had occurred prior to the acquisition by the intervenor of the exclusive license in question.

This case is submitted as constituting additional authority for the proposition that a successor to even a portion of the right of a party cannot be considered adequately represented by its predecessor in interest.

It is submitted, therefore, that Appellant's right to intervene in this case as a matter of right has been in no way impugned by any authority cited in the Brief for Appellee, and that the order of the District Court denying Appellant's Motion to Intervene should be reversed.

Dated May 11, 1953.

Respectfully submitted,

Naylor and Lassagne
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No. 13669

United States
Court of Appeals
For the Ninth Circuit.

W. W. SHEPHERD and NORMA D. SHEPHERD, Co-Partners, Doing Business as Shepherd Tractor & Equipment Co.,

Appellants.

vs.

CONSTRUCTORA, S. A., a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

FILED

APR - 4 1953

Phillps & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-20-53

No. 13669

United States Court of Appeals

For the Ninth Circuit.

W. W. SHEPHERD and NORMA D. SHEPHERD, Co-Partners, Doing Business as Shepherd Tractor & Equipment Co.,

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Phillps & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-20-53

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[Clerk's Note: When deemed likely to be of an important nature errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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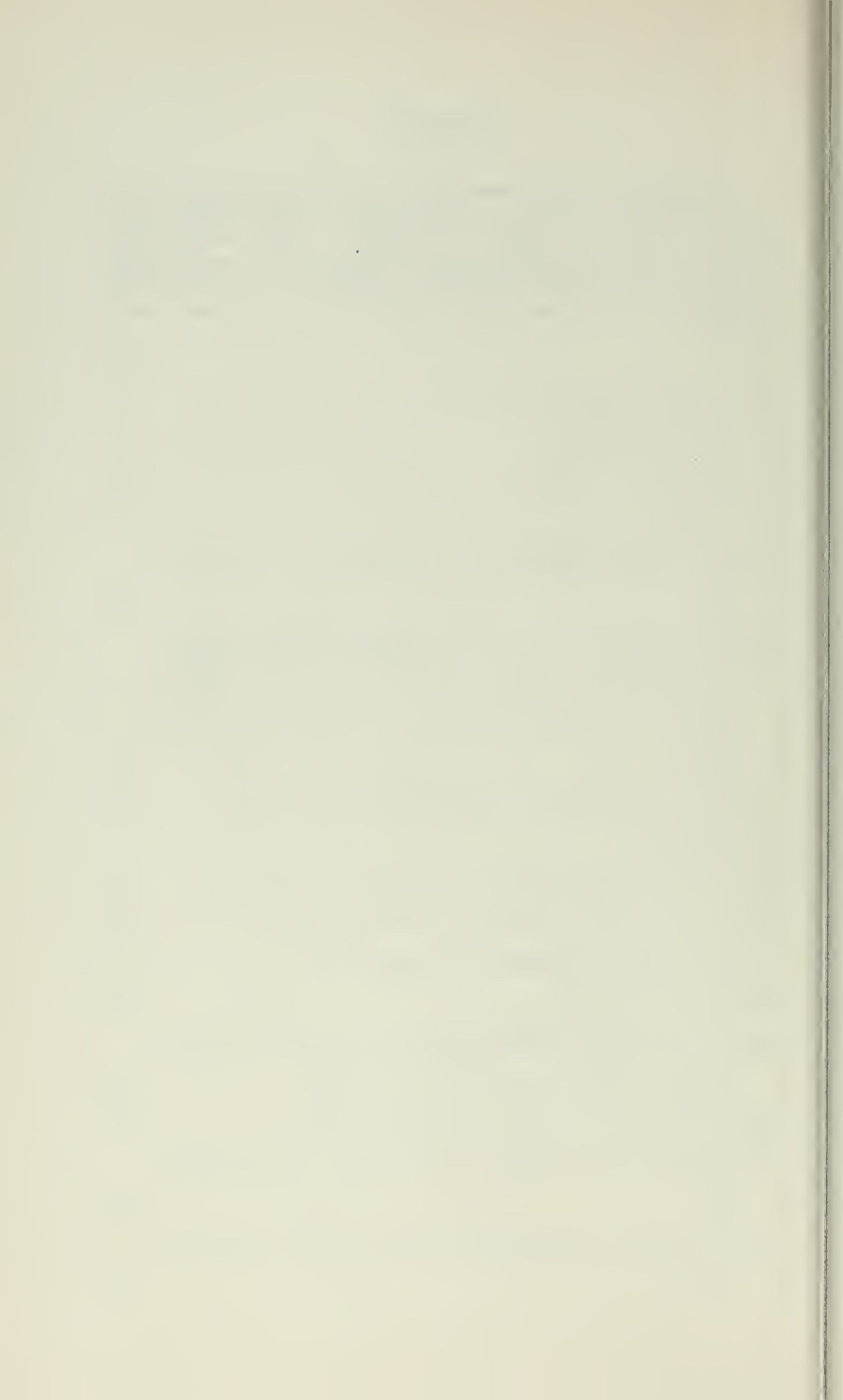

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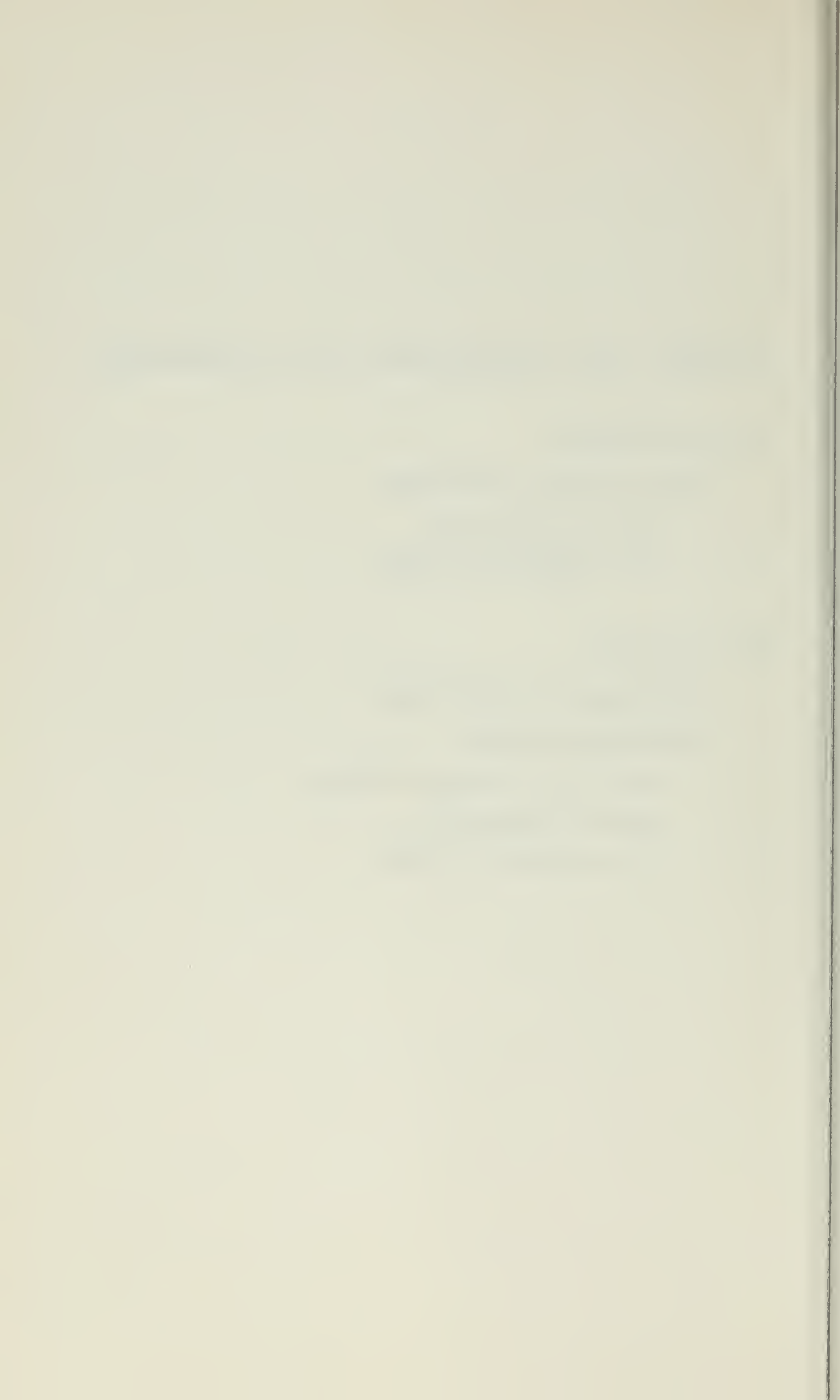


In the District Court of the United States, Southern District of California, Central Division

No. 12,890-C

CONSTRUCTORA, S. A., a Corporation,

Plaintiff,

vs.

W. W. SHEPHERD and NORMA D. SHEPHERD, Co-Partners, Doing Business as SHEPHERD TRACTOR & EQUIPMENT CO., a Co-Partnership,

Defendants.

COMPLAINT FOR TRESPASS TO PERSONAL PROPERTY

Comes Now the Plaintiff, Constructora S. A. and for cause of action for trespass to personal property alleges as follows:

I.

That the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00), and that defendants are residents of the County of Los Angeles. State of California, and plaintiff is a citizen of the Republic of Mexico.

II.

That Plaintiff, Constructora, S. A., is a citizen of the Republic of Mexico and is a Corporation duly organized and existing under and by virtue of the laws of the Republic of Mexico. That Plaintiff is a corporation engaged, among other things, in the

construction and repair of public highways and roads in the Republic of Mexico. [2*]

III.

That Defendants, W. W. Shepherd and Norma D. Shepherd, are partners doing business as Shepherd Tractor and Equipment Company. That said Defendants are duly registered to do business in the County of Los Angeles, State of California; and said defendants are residents of the County of Los Angeles, State of California.

IV.

That on or about the 26th day of February, 1949, the defendants and each of them caused and directed the Sheriff of the County of Los Angeles, State of California, to levy attachment on a certain Caterpillar 12 Motor Grader, Serial Number 9K-7086, then in the custody of Balyea Truck Company, as an incident to the defendants' action brought by them in the Superior Court of the State of California, in and for the County of Los Angeles, entitled W. W. Shepherd and Norma D. Shepherd, copartners doing business as Shepherd Tractor and Equipment Company, versus Julio A. Villasenor, doing business under the firm names and style of Juavi Export Co., and Juavi Fibers Company, Case Number SCLA556290.

V.

That upon Plaintiff's demand for an undertaking on a third-party claim the defendants declined to

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

provide said Sheriff with said undertaking; and that on the 10th day of May, 1949, the defendants applied for and did obtain from the said Superior Court a restraining order prohibiting plaintiff from transferring and encumbering, selling or disposing of said Motor Grader or removing the same from its location.

VI.

That Balyea Truck Co. was served by the defendants with a copy of said restraining order and that said Balyea Truck Co. refused to deliver said Motor Grader to plaintiff until said restraining order was dissolved. [3]

VII.

That on or about the 9th day of May, 1949, the plaintiff herein filed a third-party claim in the above-named action, in the above-named court, claiming the ownership and title to the said Motor Grader referred to above. That on or about the 3rd day of June, 1949, a trial to determine title to and ownership of the said Motor Grader was had; and that on the 16th day of August, 1949, a judgment by the said court was entered in favor of plaintiff herein and against defendants; that said judgment declared the plaintiff sole owner of the said Motor Grader and that defendants, the Juavi Export Co., the Juavi Fibers Company and Julio A. Villasenor had no title to, interest in, or right to the said Motor Grader whatsoever.

VIII.

That prior to and immediately subsequent to the attachment herein above referred to, the defend-

ants and each of them had sufficient knowledge that the said Motor Grader was the property and equipment of the plaintiff herein.

IX.

That the plaintiff was under agreement with the Republic of Mexico for the construction of certain roads and highways in the Republic of Mexico. That this Motor Grader referred to above was purchased by the plaintiff, through the Juavi Export Co. acting as brokers, for the expressed purpose of employing it in the construction of said highways and roads in the Republic of Mexico. That the said agreement by and between the Republic of Mexico and the said plaintiff provided for specified date of completion of said highways and roads and that time for the completion of the highways and roads was of the essence. That the said Motor Grader was acquired by plaintiff to make it possible for the plaintiff to complete the highway and road project in time as provided by said agreement. [4]

X.

That the said Motor Grader was kept under the said attachment by the Sheriff of the County of Los Angeles, State of California, on the specific instructions of all defendants herein, and under restraining order of said court as above mentioned, for a period of one-hundred and seventy-two days (172 days), from the 26th day of February, 1949, up to and including the 16th day of August, 1949.

XI.

That during all this time the plaintiff was without

the services of the said Motor Grader. That plaintiff was unable to rent or procure another Motor Grader of like function and service. That plaintiff was forced to employ eighty-five (85) Mexican hand-laborers and one skilled foreman to do the work of one Motor Grader. That the total hand-labor cost for a twelve hour day was One Thousand One Hundred Twenty-four Dollars and Sixty-one Pesos ($1,124.61), that at the then current rate of exchange Five Pesos were obtainable for one (1) United States Dollar. That plaintiff's total expenditure for said hand labor for a period of One Hundred Seventy-two Days (172) was Thirty-six Thousand and Eight Hundred Eighty Dollars and Eighty-three Cents ($36,880.83) in United States Dollars. The daily cost of operation and maintenance of one Motor Grader, including the cost of one skilled operator for a twelve-hour day is Four Hundred and Ninety-two Pesos (492.) that at the above rate of exchange the total cost of operating said Motor Grader for the period of One Hundred and Seventy-two Days (172) would have been Fourteen Thousand One Hundred Thirty-seven Dollars and Sixty Cents ($14,137.60). That the plaintiff by losing the services of the said Motor Grader for a period of one hundred seventy-two days lost the sum of Twenty-two Thousand Seven Hundred and Forty-three Dollars and Twenty-three Cents [5] ($22,743.23).

XII.

That the said plaintiff sent from Mexico City, Mexico, its President and General Manager, Carlos

Oriani, to Los Angeles, State of California, to procure and employ legal counsel. That plaintiff did employ and retain the law firm of Newman and Newman to represent plaintiff in all matters necessary to obtain the release of said Motor Grader. That two more trips of said Carlos Oriani were necessary to procure all necessary evidence and to testify in the above-referred-to third-party claim. That the cost of the said three round-trips from Mexico City, Mexico, to Los Angeles, California, and back, cost the plaintiff approximately the sum of Seven Hundred and Fifty Dollars ($750.00).

XIII.

That the plaintiff paid Newman and Newman, Attorneys and Counsel, qualified to appear before all the courts of the State of California and the District Court of the United States, the sum of Five Hundred Dollars ($500.00) as legal fees and costs to file the third party claim herein above referred to, and to bring about the release of plaintiff's Motor Grader referred to above.

XIV.

That defendant's wrongful acts were done with knowledge of plaintiff's title to an ownership of the said Motor Grader; and for said malice and wilful recklessness to plaintiff's rights, the plaintiff asks for the sum of Five Thousand Dollars ($5,000.00), as punitive damages.

Wherefore: The plaintiff prays the court that plaintiff, Constructora, S. A., be awarded judgment as follows:

(1) $22,743.23 for loss of use of Motor Grader;

(2) $750.00 for cost of travel incurred by plaintiff to obtain the release of said Motor Grader;

(3) $500.00 for legal fees and costs in filing a third-party claim for the release of the Motor Grader; [6]

(4) $5,000.00 for punitive damages;

(5) For costs of suit incurred herein;

(6) For such other and further relief as the court deems just and proper.

NEWMAN & NEWMAN, and

JOSEPH GALEA.

By /s/ ANTHONY N. NEWMAN.

Amendment to complaint dated February 20, 1952.

[Endorsed]: Filed February 20, 1951. [7]

[Title of District Court and Cause.]

AMENDED ANSWER

Come Now defendants above named and file this, their amended answer to plaintiff's complaint herein, as a matter of course, and admit, deny and allege as follows:

I.

Answering the allegations contained in paragraphs II, IX, XI, XII and XIII thereof, defendants allege that they have no information or belief

upon the subjects therein alleged sufficient to enable them to answer the same and, placing their denial on that ground, defendants deny generally and specifically each and every allegation contained in said paragraphs II, IX, XI, XII and XIII, and specifically deny that plaintiff has been damaged in the amounts therein alleged, or in any other amount or amounts, or at all. [8]

II.

Defendants deny generally and specifically each and every allegation contained in paragraph IV thereof, excepting that they admit that on or about February 25, 1949, they instructed said sheriff to garnish in said action said Motor Grader, which they admit was then in the possession of said Belyea Truck Co., and that on February 26 1949, said sheriff served a notice of garnishment on said Belyea Truck Co.

III.

Answering the allegations contained in paragraph V thereof, defendants admit that a demand on the sheriff was filed by plaintiff herein on a third-party claim in said action that said Motor Grader be immediately released and surrendered to said plaintiff and that in said action the court issued the restraining order described. Defendants deny that plaintiff demanded an undertaking on said third-party claim. Defendants allege that said sheriff notified them on May 10, 1949, of the receipt by him of said third-party claim and further notified these defendants that said Motor Grader would be re-

leased as demanded unless an undertaking was furnished to him as provided by law. Defendants allege that on said date they declined to provide the undertaking mentioned and on or about said date so notified said sheriff and the agent of plaintiff herein.

IV.

Answering the allegations contained in paragraph VI thereof, defendants allege that they have no information or belief sufficient to enable them to answer the allegations contained therein that Belyea Truck Co. refused to deliver said Motor Grader to plaintiff herein until the restraining order mentioned was dissolved and, placing their denial on that ground, defendants deny same generally and specifically.

Defendants deny that Belyea Truck Co. was served by them with [9] a copy of the restraining order mentioned.

V.

Answering the allegations contained in paragraph VII thereof, defendants deny that said trial occurred on July 29, 1949, or on any date except June 3, 1949, and deny that said judgment was rendered on July 29, 1949, or on any date other than August 17, 1949. Defendants further deny that said judgment declared plaintiff herein sole owner of said Motor Grader and that said Juavi Export Co., the Juavi Fibers Company and Julio A. Villasenor had no title to and/or interest in and/or right to said Motor Grader whatsoever. Defendants admit that said judgment did declare that plaintiff herein was

the owner and was entitled to the possession of said Motor Grader.

VI.

Defendants deny generally and specifically each and every allegation contained in paragraphs VIII and XIV thereof.

VII.

Defendants deny generally and specifically each and every allegation contained in paragraph X thereof, excepting that they admit that on and after May 10, 1949, and to and including on or about August 9, 1949, the restraining order mentioned had not been modified or terminated.

For a Further, Separate and Affirmative Defense to Plaintiff's Alleged Cause of Action Herein, Defendants Allege as Follows:

I.

That prior to February 26, 1949, Julio A. Villasenor, doing business under the firm names and styles of Juavi Export Co. and Juavi Fibers Company, caused the Motor Grader mentioned to be deposited with Shaw Sales and Service Co., 5100 Anaheim-Telegraph Road, Los Angeles, California, and that thereafter the same remained continuously in storage thereat to and including [10] February 24, 1949, when same was moved to the yard of Belyea Truck Co., and on February 26, 1949, and pursuant to written instructions delivered to said sheriff by defendants herein to garnish said Motor Grader,

said sheriff delivered a notice to said Belyea Truck Co. that all monies, goods, credits, effects, and debts due or owing, or any personal property belonging to said Julio A. Villasenor, doing business under the firm names and styles of Juavi Export Co. and Juavi Fibers Company, and in the possession and under the control of said Belyea Truck Co. were attached, and the latter was directeed not to pay over or transfer the same to anyone but said sheriff. The statement in writing of said garnishee describing such property was also demanded by said sheriff at the same time he delivered to said Belyea Truck Co. a copy of the writ of attachment issued in the action described in the complaint herein. That no further or other instructions were given by defendants herein to said sheriff with reference to said Motor Grader.

II.

That the Motor Grader referred to is mounted on six wheels with rubber tires, four of which are in the rear and two in front. That the same is powered with a diesel motor and is equipped with a tandem drive and may be driven by a single operator over any roadway or surface at a continuous speed of approximately twelve miles per hour. That the same was so equipped on February 26, 1949, and was in good operating condition.

III.

That following delivery by said sheriff of said notice and writ as aforesaid, said Motor Grader thereafter remained continuously in the possession

of Belyea Truck Co. as a result of the deposit of said Motor Grader with it by Julio A. Villasenor, doing business under the firm names and styles of Juavi Export Co. and Juavi Fibers Company, and said restraining order, and not [11] otherwise, until on or about August 17, 1949, when said Belyea Truck Co. delivered the same to plaintiff herein at Tijuana, Mexico.

Wherefore, defendants pray that plaintiff take nothing by its action and that defendants be awarded judgment for their costs of suit herein.

/s/ WILLIAM K. YOUNG,
Attorney for Defendants

Receipt of copy acknowledged.

[Endorsed]: Filed April 6, 1951. [12]

[Title of District Court and Cause.]

MINUTES OF THE COURT—FEB. 11, 1952

At Los Angeles, Calif.

Present: The Honorable James M. Carter,
District Judge.

Nature of Proceedings—Ruling

For Pretrial Hearing:

On motion of plaintiff it is ordered that the complaint be amended by interlineation in several instances, and amendments are made in the original complaint by interlineation at this time.

On motion of plaintiff it is ordered that plaintiff may file an amendment to its complaint as to paragraph eleven, and it is stipulated and ordered that the new allegation be deemed denied by defendants.

Court and counsel confer as to the facts and issues.

It Is Ordered that plaintiff prepare and present pretrial stipulation of facts and issues for the Court's approval within ten days.

EDMUND L. SMITH,
Clerk.

By /s/ L. B. FIGG,
Deputy Clerk. [14]

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

Upon motion of plaintiff herein the above-entitled Court did on the 11th day of February, 1952, order that plaintiff's complaint, paragraph XI thereof, be amended to read as follows:

"That plaintiff was deprived of the use of said motor grader during the time above alleged. That although plaintiff did seek to rent or procure another motor grader of like function and service, plaintiff was unable to find another such motor grader;

"That the reasonable rental cost to plaintiff of a similar motor grader in the County of Los Angeles, during the time the same was wrongfully detained by the defendants herein, and as such the damage

to the plaintiff was the sum of Twelve Thousand and Forty Dollars ($12,040.00)."

The said Court also did order that defendants herein shall [15] be deemed to have denied all of the allegations contained in said paragraph XI as above amended.

NEWMAN & NEWMAN, and
JOSEPH GALEA,
Attorneys for Plaintiff.

By /s/ ANTHONY M. NEWMAN.

It Is So Ordered this 20th day of February, 1952.

/s/ JAMES M. CARTER,
Judge, U. S. District Court.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 20, 1952. [16]

[Title of District Court and Cause.]

STIPULATION OF FACTS AND ISSUES AND PRE-TRIAL ORDER

I.

Stipulation of Facts

It Is Stipulated, by and between the parties hereto, through their respective counsel of record, that the following facts are true:

1. That plaintiff, Constructora, S. A., is, and was at all times herein mentioned, a citizen of the Re-

public of Mexico and is a corporation duly organized and existing under and by virtue of the laws of the Republic of Mexico.

2. That Carlos Oriani is, and was at all times herein mentioned, the duly constituted and appointed General Manager and representative of the plaintiff herein.

3. That on the 25th day of February, 1949, defendants herein instructed the Sheriff of the County of Los Angeles to garnish [18] the motor grader in question, which was then located at the yard of the Belyea Trucking Company.

4. That said garnishment was served pursuant to a writ of attachment issued upon the application of defendants, as an incident to defendants' action brought by them in the Superior Court of the State of California, in and for the County of Los Angeles, entitled "W. W. Shepherd and Norma D. Shepherd, co-partners doing business as Shepherd Tractor and Equipment Company, versus Julio A. Villasenor, doing business under the firm names and style of Juavi Export Co. and Juavi Fibers Company," Case Number SCLA 556290.

5. That on the 9th day of May, 1949, plaintiff herein filed with the Sheriff of the County of Los Angeles, a third-party claim to said motor grader.

6. That on the 10th day of May, 1949, the Sheriff of the County of Los Angeles demanded of the defendants herein an undertaking on said third-party claim.

7. That on the 10th day of May, 1949, defendants declined to provide said Sheriff with said undertaking.

8. That on the 10th day of May, 1949, defendants herein applied for, and did obtain from the Superior Court of the State of California, in and for the County of Los Angeles, a restraining order, by virtue of which plaintiff amongst others was restrained from transfering, encumbering or making any other disposition of said motor grader, or removing the same from its present location until the proceedings for the determination of the title of said motor grader were prosecuted to a final determination, and that said restraining order remained in effect up to and including the 16th day of August, 1949.

9. That on or about the 11th day of May, 1949, the plaintiff herein filed a third-party claim in the above-mentioned action, in the above-named court, claiming the ownership and title to the [19] said motor grader referred to above. That on or about the 3rd day of June, 1949, a trial to determine title to and ownership of said motor grader was had; and that on the 16th day of August, 1949, a judgment by the said Court was entered and recorded in the files of the Superior Court of the State of California, in and for the County of Los Angeles, in favor of plaintiff herein and against defendants; that said judgment held "that the third-party claimant is the owner and is entitled to the possession of the motor grader under attachment and that the Sheriff be ordered to release said property to it."

10. That if Carlos Oriani should be called to the stand as a witness, he would testify that:

(a) The Plaintiff spent a total of Two Hundred Twenty-five Dollars ($225.00) for expenses in pursuit of the chattel in question, aside from attorney's fees paid.

(b) That on April 14, 1949, Mr. Oriani granted, on behalf of plaintiff, a power of attorney to Anthony M. Newman and retained him as counsel to prosecute the third-party claim, and that prior to this date, as mentioned, Anthony M. Newman had not been retained as counsel for, nor did he hold the power of attorney of, the plaintiff.

II.

Documentary Evidence to Be Permitted

It Is Hereby Stipulated that only the following documents shall be introduced in evidence at trial by the parties herein:

1. By plaintiff:

(a) File and records of the Superior Court of the State of California, in and for the County of Los Angeles, No. 556290, entitled "W. W. Shepherd, et al., versus Julio A. Villasenor, et al."

(b) Photostats or original pertaining to application and export permit concerning shipment of the motor grader in [20] question.

(c) Documents pertaining to proof of expenses incurred by plaintiff in pursuit of return of motor grader.

2. By defendants:

(a) File of Sheriff of the County of Los Angeles concerning attachment or garnishment of the motor grader in question, or copies thereof.

(b) File of Belyea Trucking Company concerning the said motor grader, or copies thereof.

(c) Documents or photostats pertaining to applications for, and export permits concerning the shipment of said motor grader, or copies thereof.

III.

General Stipulations

1. It is stipulated that plaintiff and defendants shall be limited to one expert witness each to prove the reasonable rental value in the County of Los Angeles of a motor grader of the type in question during the period of February 26, 1949, to and including August 16, 1949. No implication shall arise from the foregoing that defendants concede the admissibility of such evidence, and said stipulation is without prejudice to any rights of the parties herein.

2. It is stipulated that there shall be no other expert witnesses used on trial by either party.

3. It is stipulated that should the Court find for the plaintiff and against the defendants, the Court shall, from its examinations of the third-party claim file, determine the reasonable amount of attorney's fees that defendants shall be liable for, as part of the special damages due plaintiff herein.

4. It is stipulated that the allegations of paragraph XI as amended by order of Court issued on February 11, 1952, are deemed denied by the defendants herein. [21]

5. It is stipulated that the general damages of plaintiff, if any are assessed by the Court, in addition to the expense of recovery of the motor grader, shall be the net or gross rental value of said motor grader for the period it was wrongfully detained in the County of Los Angeles, but in an amount which the Court finds is not disproportionate to the value of the motor grader.

IV.

Statement of Issues

It Is Further Stipulated that the issues joined in the above action include the following:

A—Liability.

1. Was there a valid levy of an attachment on the motor grader that operated to deprive plaintiff of its possession?

2. Did the garnishment served on Belyea Trucking Company operate to deprive plaintiff of the possession of the motor grader?

3. What effect, if any, did Belyea Trucking Company's omission to answer the Sheriff on the garnishment have on plaintiff's right to possession of the motor grader prior to August 4, 1945?

4. Did the Superior Court have jurisdiction to

determine the third-party claim, and may such issue be raised in this action?

5. If the issues determined by the judgment of the Superior Court are not res adjudicated because of the judgment being void, then are the issues purportedly determined therein issues to be determined in this action?

6. Is the mere procurement of an injunction independent of other circumstances actionable, if judgment is not ultimately recovered by the party procuring same?

7. Does the fact that defendants herein were not required by plaintiff to furnish a bond or undertaking in support of said restraining order, absolve the defendants from any liability herein [22] for damages for the detention of said motor grader?

B—Damages.

1. If an owner recovers property of which he is wrongfully deprived, are the damages he may be entitled to limited to the expense of its recovery, with interest?

2. If damages are recoverable in excess of the cost of recovery of the property mentioned, plus interest, is such excess limited to the net or gross rental value thereof in an amount not disproportionate to the value of the property?

3. The period for which plaintiff is entitled to recover the rental value of the motor grader, either gross or net rental.

4. Is the period for which plaintiff may be entitled to recover the net or gross value of said motor grader affected by plaintiff's action in the following respects:

(a) The omission of plaintiff to file its third-party claim, or to institute other action or proceedings to recover the motor grader between February 26, 1949, and May 9, 1949.

(b) The omission of plaintiff to apply for a modification of the injunction of the Superior Court or an order requiring the filing of a bond as a condition for the continuance of said injunction.

Dated March 3, 1952.

NEWMAN & NEWMAN, and
JOSEPH GALEA,
Attorneys for Plaintiff.

By /s/ ANTHONY M. NEWMAN.

/s/ WILLIAM K. YOUNG,
Attorney for Defendants.

It Is So Ordered.

/s/ JAMES M. CARTER,
Judge, U. S. District Court.

[Endorsed]: Filed March 4, 1952. [23]

[Title of District Court and Cause.]

MINUTES OF THE COURT—APRIL 29, 1952

Present: The Honorable James M. Carter,
District Judge.

This cause having been taken under submission, and the Court having duly considered the matter, the Court now finds in favor of the plaintiff and against the defendants, and assesses the recovery in the total sum of $2,898.70, consisting of damages for five months and twenty-one days at $381.40 per month, $2,173.70; attorney's fees $500.00; and expenses of recovering property, $225.00; plaintiff to have its costs of suit; counsel for plaintiff to prepare and present findings of fact, conclusions of law and judgment within ten days.

EDMUND L. SMITH,
Clerk.

By /s/ L. B. FIGG,
Deputy Clerk. [24]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on the 4th day of March, 1952, in the United States District Court for the Southern District of California, Central Division, Honorable James M. Carter, Judge Presiding, without a jury, the plaintiff being repre-

sented by its counsel of record, Newman & Newman, by Anthony M. Newman, Esq. and Joseph Galea, Esq.; the defendants W. W. Shepherd and Norma D. Shepherd, co-partners doing business as Shepherd Tractor & Equipment Co., a co-partnership, being represented by William K. Young, Esq.; and

Evidence both oral and documentary having been received, and the cause being argued by all counsel and submitted for decision, the court now makes findings of fact and conclusions of law as [25] follows:

I.

That it is true that plaintiff Constructora, S. A. is, and was at all times herein mentioned, a citizen of the Republic of Mexico and is a corporation duly organized and existing under and by virtue of the laws of the Republic of Mexico.

II.

That is is true that defendants W. W. Shepherd and Norma D. Shepherd are partners doing business as Shepherd Tractor and Equipment Company. That said defendants are duly registered to do business in the County of Los Angeles, State of California: and said defendants are residents of the County of Los Angeles, State of California.

III.

That it is true that Carlos Oriani is, and was at all times herein mentioned, the duly constituted and appointed General Manager and representative of the plaintiff herein.

IV.

That it is true that in an action pending in the Superior Court of the State of California, in and for the County of Los Angeles, No. 556290 and entitled W. W. Shepherd, et al., versus Julio A. Villasenor, et al., the defendants did on the 25th day of February, 1949, garnish and attach a certain Caterpillar 12 Motor Grader, Serial Number 9K-7086, and that said Motor Grader was then in the possession of the Belyea Truck Company, a trucking company, and that said equipment had been delivered to said trucking company by plaintiff's agent for shipment to plaintiff.

V.

That it is true that said garnishment was served pursuant to a Writ of Attachment issued upon the application of defendants as an incident to defendants' action brought by them in the Superior Court of the State of California, in and for the County of Los Angeles, entitled W. W. Shepherd and Norma D. Shepherd, co-partners [26] doing business as Shepherd Tractor and Equipment Company, versus Julio A. Villasenor, doing business under the firm names and style of Juavi Export Co. and Juavi Fibers Company, Case Number S.C.L.A. 556290.

VI.

That it is true that on the 9th day of May, 1949, a third party claim was filed by the plaintiff with the Sheriff of the County of Los Angeles, asserting title in, and demanding release of, said Motor

Grader, and that on the 10th day of May, 1949, said Sheriff served notice upon defendants as provided by Section 689 of the California Code of Civil Procedure requiring the defendants to post bond, and that said defendants refused to post said bond and so notified said Sheriff of said county.

VII.

That it is true that on the 10th day of May, 1949, defendants herein applied for and did obtain from the Superior Court of the State of California, in and for the County of Los Angeles, a restraining order, by virtue of which plaintiff, amongst others, was restrained from transfering, encumbering or making any other disposition of said Motor Grader, or removing the same from its present location until the proceedings for the determination of the title of said Motor Grader were prosecuted to a final determination, and that said restraining order remained in effect up to and including the 16th day of August, 1949, and that defendants did not post an indemnity bond upon obtaining said restraining order.

VIII.

That it is true that on the 10th day of May, 1949, the defendants petitioned the said Superior Court of the State of California, in and for the County of Los Angeles, for a hearing on the Third Party Claim.

IX.

That it is true that on or about the 3rd day of June, 1949, [27] a trial to determine title to and

ownership of said Motor Grader was had in said Superior Court, and that on the 16th day of August, 1949, a judgment by the said court was entered and recorded in the files of the Superior Court of the State of California, in and for the County of Los Angeles, in Book 2069, Page 152, of Judgment Book of said court, in favor of plaintiff herein and against defendants; that said judgment held among other things: "that the third party claimant is the owner and is entitled to the possession of the motor grader under attachment and that the Sheriff be ordered to release said property to it"; and that it is true that this action was promptly tried and that no delay in the trial of said action was sought by plaintiff herein.

X.

That it is true that the said Motor Grader, the property of plaintiff herein, was detained by the defendants and withheld from said plaintiff, and was so detained for the period of five months and twenty-one days; that during two months and fourteen days, to wit: From February 26, 1949, to and including May 10, 1949, the said Motor Grader was so detained and withheld by virtue of said Writ of Attachment and garnishment; and that during three months and six days, to wit: From May 10, 1949, to August 16, 1949, the said Motor Grader was detained by virtue of the Restraining Order petitioned for and obtained by said defendants.

XI.

That it is true that by reason of said detention plaintiff did sustain damages for the loss of reason-

able rental use of said Motor Grader, and the total amount of $2,173.70 for the detention of said Motor Grader for the period of five months and twenty-one days at the rate of $381.40 net per month; that it is true that upon stipulation of both parties entered into in open court during trial of said cause, it was stipulated and agreed that in the event plaintiff were to be entitled to recover damages for the loss of [28] use of said Motor Grader, the measure of damages was to be computed in the alternative as follows: $30.20 per day; $148.00 per week; and $381.40 per month; that the rates so stipulated to were computed in concert by one expert witness for the plaintiff and one expert witness for the defendant.

XII.

That is is true that the monthly rate of $381.40 for the loss of use of said Motor Grader was the rate found by this court to be the measure of damages.

XIII.

That it is true that plaintiff did pay the sum of $500.00 to its attorneys, Newman & Newman, to procure the release of said Motor Grader, and that the said sum of $500.00 was a reasonable sum for the services rendered to plaintiff by said law firm.

XIV.

That it is true that plaintiff did expend the sum of $225.00 in pursuit of said chattel.

Conclusions of Law

As conclusions of law from the findings of facts the court finds as follows:

I.

That on the 25th day of February, 1949, the defendants petitioned the Superior Court of the State of California, in and for the County of Los Angeles, to garnish and attach a certain Caterpillar 12 Motor Grader, Serial Number 9K7086, the property of the plaintiff. That said Writ of Garnishment and Attachment was lawfully issued by said court and lawfully served by the Sheriff of the County of Los Angeles, State of California, and that by virtue of said Writ of Attachment said Sheriff did take valid and lawful possession of said Motor Grader. The said Writ of [29] Attachment remained in full force and effect from the 25th of February, 1949, to and including the 10th day of May, 1949.

II.

That on the 10th day of May, 1949, defendants herein caused the said Superior Court to issue a valid restraining order, by virtue of which the plaintiff, among other parties, was restrained from transferring, encumbering or making any other disposition of said Motor Grader, or removing the same from its location until the proceedings for the determination of the title of said Motor Grader were prosecuted to a final determination; and that said restraining order remained in effect up to and including the 16th day of August, 1949.

III.

That the fact that plaintiff did not require defendants to post an indemnity bond for the said restraining order obtained by defendants as aforesaid, does not relieve defendants from liability for all damages directly and proximately caused by defendants' trespass which interfered with the plaintiff's right to possession of the said Motor Grader, including loss of use, monies expended in pursuit of the chattel, and attorney's fees expended in the prosecution of a Third Party Claim to recover said Motor Grader; and that the fact the defendants did not act with malice or ill will, or without probable cause, does not excuse the said defendants from the damages caused plaintiff by said defendants.

IV.

That the Superior Court of the State of California, in and for the County of Los Angeles, which tried said Third Party Claim had jurisdiction to try said cause to determine title to and possession of said Motor Grader; that further the defendants herein are estopped from questioning the jurisdiction of said court in the trial of the Third Party Claim, since the defendants themselves requested the said Superior Court to set the Third Party Claim for [30] trial and determination.

V.

That taking into consideration the circumstances of the Third Party Claim and the procedure had therein, the residence and citizenship of the plain-

tiff, and the nature of the controversy, the plaintiff herein acted in a businesslike, prudent, and timely manner in protecting and asserting its rights to the possession of said Motor Grader.

VI.

That defendants' acts in obtaining the Writ of Attachment and Restraining Order as aforesaid constitute an unlawful interference and trespass to plaintiff's title to and right to possession of said Motor Grader, and that therefore this court finds that plaintiff is entitled to judgment against the defendants in the sum of $2,898.70, and that plaintiff is to have its cost of suit, and that said judgment be entered accordingly.

Done in Open Court this 19th day of September, 1952.

/s/ JAMES M. CARTER,
Judge, United States District Court.

Approved by defendants as to form:

/s/ WILLIAM K. YOUNG,
Attorney for Defendants.

Affidavit of service by mail attached.

Revised Proposed Findings, etc. Lodged September 16, 1952.

[Endorsed]: Filed September 16, 1952. [31]

In the District Court of the United States, Southern District of California, Central Division

No. 12,890-C

CONSTRUCTORA, S. A., a Corporation,

Plaintiff,

vs.

W. W. SHEPHERD and NORMA D. SHEPHERD, Co-partners Doing Business as SHEPHERD TRACTOR & EQUIPMENT CO., a Co-partnership,

Defendants.

JUDGMENT

This cause came on regularly for trial on the 4th day of March, 1952, in the United States District Court for the Southern District of California, Central Division, Honorable James M. Carter, Judge presiding, without a jury, the plaintiff being represented by its counsel of record, Newman & Newman, by Anthony M. Newman, Esq. and Joseph Galea, Esq.; the defendants, W. W. Shepherd and Norma D. Shepherd, co-partners doing business as Shepherd Tractor & Equipment Co., a co-partnership, being represented by William K. Young, Esq.; and,

Evidence both oral and documentary having been received, and the cause having been further argued by all counsel and submitted for decision, and the Court having heretofore made its findings of fact and conclusions of law, now renders judgment in accordance [33] with the findings of fact and conclusions of law as follows:

It Is Ordered, Adjudged and Decreed:

That plaintiff have judgment against the defendants in the sum of Two Thousand Eight Hundred Ninety-eight Dollars and Seventy Cents ($2,898.70), and that plaintiff have its costs of suit herein.

Costs taxed at $49.14.

The Clerk is ordered to enter this Judgment.

Done in open Court this 19th day of Sept., 1952.

/s/ JAMES M. CARTER,
Judge, United States District Court.

Affidavit of service by mail attached.

Receipt of copy acknowledged.

Lodged May 1, 1952.

[Endorsed]: Filed September 19, 1952.

Docketed and entered September 22, 1952. [34]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that defendants W. W. Shepherd and Norma D. Shepherd, co-partners doing business as Shepherd Tractor & Equipment Co., a co-partnership, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the

final judgment entered in this action on September 22, 1952.

/s/ WILLIAM K. YOUNG,
Attorney for Defendants.

Dated: October 16, 1952.

Receipt of copy acknowledged.

[Endorsed]: Filed October 16, 1952. [36]

[Title of District Court and Cause.]

ORDER EXTENDING DEFENDANTS' TIME FOR FILING AND DOCKETING RECORD ON APPEAL

Upon application of defendants, and it appearing to be a proper case for such an order and to allow additional time for the preparation of the reporter's transcript herein; now therefore,

It Is Hereby Ordered that the time be, and it is hereby, extended to and including December 24, 1952, within which the defendants may file the record on appeal herein and docket the same with the appellate court.

Dated: November 14, 1952.

/s/ JAMES M. CARTER,
Judge.

[Endorsed]: Filed November 14, 1952. [40]

In the United States District Court, Southern District of California, Central Division

No. 12,890-C

CONSTRUCTORA, S. A., a Corporation,
Plaintiff,

vs.

W. W. SHEPHERD and NORMA D. SHEPHERD, Co-partners Doing Business as SHEPHERD TRACTOR & EQUIPMENT CO., a Co-partnership,
Defendants.

Honorable James M. Carter, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Tuesday, March 4, 1952

Appearances:

For the Plaintiff:

NEWMAN & NEWMAN, By
ANTHONY NEWMAN, ESQ., and
JOSEPH GALEA, ESQ.

For the Defendants:

WILLIAM K. YOUNG, ESQ.

* * *

Mr. Newman: If the Court please, I wish to offer into evidence the file of the third party claim suit, as mentioned in the trial brief of the plaintiff.

Mr. Young: I object to it on the ground that it

appears on the face of the pleadings contained in the claim that the court had no jurisdiction.

The Court: We will mark it for identification as Plaintiff's Exhibit 1. [2*]

* * *

The Court: You have got a nice point, and it is going to depend on what is the definition of that word "levy."

I am going to overrule your objection and admit the third party file into evidence, reserving to you a motion to strike, which you have to again call to the court's attention. I will reserve you that right. That will give us some more time to look into this question of levy. [4]

It will be received in evidence as Plaintiff's Exhibit 1.

(The document referred to, and marked Plaintiff's Exhibit 1, was received in evidence.)

PLAINTIFF'S EXHIBIT No. 1

In the Superior Court of the State of California in and for the County of Los Angeles

No. 556290

W. W. SHEPHERD, et al., etc.,

Plaintiffs,

vs.

JULIO A. VILLASENOR, etc.,

Defendant.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Plaintiff's Exhibit No. 1—(Continued)

PETITION FOR HEARING TO DETERMINE TITLE RE THIRD PARTY CLAIM OF CONSTRUCTORA, S. A., A MEXICAN CORPORATION

To the Superior Court of the State of California in and for the County of Los Angeles:

Come Now plaintiffs, as petitioners, and represent to the court as follows:

That on or about February 26, 1949, plaintiffs caused to be levied by the Sheriff of Los Angeles County, California, a writ of attachment issued in the above-entitled action, on the personal property hereinafter described and situated at Belyea Truck Co., 6800 South Alameda Street, Los Angeles, California.

That on or about May 9, 1949, Constructora, S. A., a Mexican corporation, by and through its attorneys, Newman & Newman, delivered to said Sheriff a verified third party claim wherein the title and ownership of said personal property was claimed by said Constructora, S. A., a Mexican corporation. That on May 10, 1949, said Sheriff notified plaintiffs of the delivery to him of said third party claim, and stated that unless the undertaking required by Section 689 of the Code of Civil Procedure was delivered to him, he would release said property. That plaintiffs declined to provide the undertaking mentioned and requested.

That plaintiffs hereby petition the court to grant a hearing for the purpose of determining the title

Plaintiff's Exhibit No. 1—(Continued)

to said personal property. That pending the final determination of said matter it would be in the furtherance of justice to forbid a transfer, removal from its present location, or other disposition of said personal property by said claimant, his agent, or defendant herein.

The personal property referred to is described as follows:

Caterpillar 12 Diesel Motor Grader, Serial #9K-7086, and same is presently located at Belyea Truck Co., 6800 South Alameda Street, Los Angeles, California.

Wherefore, petitioners pray that an order be made granting a hearing before the above-entitled court for the purpose of determining title to the personal property herein described, and that pending the final determination of said matter, Constructora, S. A., a Mexican corporation, its agent, or defendant herein be forbidden from making a transfer or other disposition of said personal property or removing the same from its present location.

Dated: May 10, 1949.

W. W. SHEPHERD and NORMA B. SHEPHERD, Co-partners, Doing Business as SHEPHERD TRACTOR & EQUIPMENT CO.

By /s/ W. W. MURPHY,
Credit Manager.
Plaintiffs and Petitioners.

Plaintiff's Exhibit No. 1—(Continued)

/s/ WILLIAM K. YOUNG,
Attorney for Plaintiffs and Petitioners.

[Endorsed]: Filed May 10, 1949, Superior Court.

In the Superior Court of the State of California in and for the County of Los Angeles

No. 556290

W. W. SHEPHERD, et al., etc.,

Plaintiffs,

vs.

JULIO A. VILLASENOR, etc.,

Defendant.

ORDER FOR, AND NOTICE OF, HEARING TO DETERMINE TITLE RE THIRD PARTY CLAIM OF CONSTRUCTORA, S. A., A MEXICAN CORPORATION, AND RESTRAINING ORDER

It appearing to the satisfaction of the court from the petition of plaintiffs that on or about May 9, 1949, Constructora, S. A., a Mexican corporation, by and through its attorneys, Newman & Newman, delivered to the Sheriff of Los Angeles County, California, a verified claim of ownership of certain personal property levied upon by said Sheriff under and by virtue of a writ of attachment issued in the

Plaintiff's Exhibit No. 1—(Continued)

above-entitled action, said personal property being described as follows:

Caterpillar 12 Diesel Motor Grader, Serial #9K-7086, and presently located at Belyea Truck Co., 6800 South Alameda Street, Los Angeles, California,

It Is Hereby Ordered that a hearing be had in Department 1 of the above-entitled court on the 23rd day of May, 1949, at the hour of 9:15 a.m. of said day, for the purpose of determining title to said personal property in accordance with Section 689 of the Code of Civil Procedure.

Notice Is Hereby Given to all parties claiming an interest in said property to appear at said time and place and present their claims.

It further appearing that plaintiffs have declined to provide said Sheriff with the undertaking mentioned in Section 689 of the Code of Civil Procedure,

It Is Ordered that until the proceedings for the determination of the title mentioned are prosecuted to final determination, the said Constructora, S. A., a Mexican corporation, its agent, and/or defendant herein be, and they are hereby, forbidden from transferring, encumbering, or making any other disposition of said personal property or removing the same from its present location.

Dated: May 10th, 1949.

/s/ [Illegible]

Presiding Judge.

Plaintiff's Exhibit No. 1—(Continued)

Office of the Sheriff,
County of Los Angeles,
State of California.

I, E. W. Biscailuz, Sheriff of the County of Los Angeles, do hereby certify that I received the annexed third party claim on the 10th day of May, 1949, and I further certify that I have complied with Section 689 CCP.

Dated: May 11, 1949.

E. W. BISCAILUZ,
Sheriff,

By /s/ F. E. MOONEY,
Deputy Sheriff.

[Endorsed]: Filed May 10, 1949, Superior Court.

In the Superior Court of the State of California
in and for the County of Los Angeles
No. 556290

W. W. SHEPHERD, et al.,
Plaintiffs,

vs.

JULIO A. VILLASENOR, Doing Business Under the Firm Names and Styles of JUAVI EXPORT CO. and JUAVI FIBERS COMPANY,
Defendants.

THIRD PARTY CLAIM

To the Sheriff of the County of Los Angeles:

You Are Hereby Notified that the following described property held by you under attachment in

Plaintiff's Exhibit No. 1—(Continued)

the above-entitled action is, and at the time of the levy was, the property of Constructora, S. A., a Mexican corporation, and that said corporation is entitled to its possession; that said corporation acquired title to said property on the 10th day of June, 1948, by purchase from Julio A. Villasenor, doing business under the fictitious firm names of Juavi Export Company and formerly known as Juavi Fibers Company; that title of said property was conveyed to the claimant by commercial invoice on said last mentioned date, and that thereafter the said property was placed in storage by claimant pending shipment and that shortly before the attachment, claimant instructed the Belyea Truck Company to ship said property to claimant, but that said shipment was not consummated, and that ever since its sale and subsequent storage, said property has been stored for the account and benefit of claimant, first with the Shaw Sales Company at Wilmington, California and subsequently with the Belyea Truck Company, who was to ship said property to Mexico where claimant resides.

That claimant paid Juavi Export Company the sum of Ten Thousand Five Hundred Dollars ($10,-500.00) for the property described hereinafter and under attachment herein, and that said sum is still the reasonable value of that property at this time.

That the property attached herein and claimed by the undersigned, is described as a Motor-grader with Caterpillar Model 12, serial number 9K-7086.

Plaintiff's Exhibit No. 1—(Continued)

Wherefore, demand is made upon you for the immediate release and surrender of said property to the undersigned or its attorneys.

NEWMAN & NEWMAN,
Attorneys for Claimant.

By /s/ ANTHONY M. NEWMAN.

State of California,
County of Los Angeles—ss.

Anthony M. Newman, being first duly sworn says: That he is the attorney at law and attorney in fact of the claimant, Constructora, S. A., a Mexican Corporation, and in such capacity signed the foregoing notice and claim; that he has read said document and the facts therein stated are true.

/s/ ANTHONY M. NEWMAN.

Subscribed and sworn to before me this 9th day of May, 1949.

/s/ BENJAMIN U. VEGA, JR.,
Notary Public in and for said
County and State.

My commission expires April 25, 1952.

[Endorsed]: Filed May 11, 1949, Superior Court.

Plaintiff's Exhibit No. 1—(Continued)

In the Superior Court of the State of California in and for the County of Los Angeles

No. 556290

W. W. SHEPHERD, et al., etc.,

Plaintiff,

vs.

JULIO A. VILLASENOR, etc.,

Defendant.

JUDGMENT RE THIRD PARTY CLAIM

This cause came on regularly for trial before the above-entitled Court, the Honorable Daniel N. Stevens, Judge Presiding, sitting without a jury in Department 23 thereof on the 3rd day of June, 1949. William K. Young, Esq., appearing as counsel for the plaintiff and Messrs. Newman & Newman, by Anthony M. Newman, appearing as counsel for the Third Party Claimant, and the Court having heard the testimony, and having examined the proofs offered by the respective parties, and the cause having been argued by the respective parties, and the Court having been fully advised on the premises, and the cause having been submitted to the Court for its decision, and the Court having directed that judgment be entered in accordance therewith; now, therefore, by reason of the law and the decision aforesaid:

Plaintiff's Exhibit No. 1—(Continued)

It Is Hereby Ordered, Adjudged and Decreed:

That Third Party Claimant is the owner and is entitled to the possession of the Motor Grader under attachment and that the Sheriff is ordered to release said property to it.

Dated this 17th day of August, 1949.

/s/ DANIEL N. STEVENS,
Judge of the Superior Court.

[Endorsed]: Filed August 17, 1949, Superior Court.

Entered August 18, 1949.

No. 556290

W. W. SHEPHERD and NORMA D. SHEPHERD, Co-partners, Doing Business as SHEPHERD TRACTOR & EQUIPMENT CO.,

vs.

JULIO A. VILLASENOR, etc.

State of California,
County of Los Angeles—ss.

I, Harold J. Ostly, County Clerk and Clerk of the Superior Court within and for the county and state aforesaid, do hereby certify the foregoing to be a correct copy of the original Petition for Hearing, etc., filed May 10th, 1949; Order, etc. filed May 10th, 1949; Receipt, dated May 11, 1949; Third Party

Plaintiff's Exhibit No. 1—(Continued)

Claim, May 11th, 1949; and Judgment re Third Party Claim, filed August 17th, 1949, and thereafter entered August 18th, 1949, in Book 2069 at Page 368 of Judgments, on file and/or of record in my office, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 23rd day of December, 1952.

[Seal] HAROLD J. OSTLY,
County Clerk,

By /s/ H. EPPERSON,
Deputy.

Admitted in evidence March 4, 1952, U.S.D.C.

Mr. Newman: If the Court please, we have marked in that file the four items which we consider pertinent. The third party claim action that was filed contains the original third party claim, the writ of attachment, and the judgment of the court. [5]

* * *

Mr. Newman: Of course we may say just this much; that we contend that the sheriff had constructive possession by the mere service of that writ of attachment.

I agree with Mr. Young that he had no physical possession, that he didn't carry the motor grader, nor any agent for the sheriff, carry the motor grader out of the premises.

Mr. Young: Do you also not agree that the sheriff did not place a keeper in charge?

Mr. Newman: That is correct. [7]

* * *

Mr. Newman: If the Court please, we have an offer of proof on the matter of damages, which we have had the two experts agree upon, but Mr. Young, I believe, wishes to object to the introduction of the loss on detention on the [10] basis— we say that the cases we have cited in our brief show that aside from the money——

The Court: I understand what you said in your briefs; do you expect to call your witness or read the offer of proof and let me rule on the objection?

Mr. Newman: We have a stipulation.

Mr. Young: We have a stipulation if the witness was called, as to what he would testify to, and the stipulation is without prejudice to either Mr. Newman or myself with respect to its admissibility.

The Court: Read the stipulation as an offer of proof, and then make your objection.

Mr. Newman: It is your figures.

Mr. Young: You read it.

Mr. Newman: The loss of use for one month would be a gross of $575, and a net of $381.40. Loss of use on the basis of two weeks or less will be $192 gross per week, and $148 net per week. On the basis of one day, five days or less, $39 gross per day, and $30.20 net per day. The daily rate is applicable only if no more than five days are involved.

Mr. Young: Your Honor, in connection with this stipulation it is my understanding that the difference between the gross and the net figures is represented by the amount that it would cost the lessor to maintain and keep the equipment in good condition during the period of time it was being used by the [11] lessee, so that his net recovery would be the net figure that has been stated in each instance.

The Court: All right.

The stipulation is entered into without prejudice to your right to object, and Mr. Newman has offered this stipulation as being the gist of what experts would testify to, and you so stipulate?

Mr. Young: Yes, your Honor.

The Court: What is your objection?

Mr. Young: I wish now to object to the admissibility of the evidence on the ground that the measure of damage, if any, of the plaintiff, is limited to the costs, expenses of recovering possession of the property assertedly levied on improperly, which in this instance would be represented by the figure stipulated to in the stipulation on file respecting the attendance of Mr. Oriani, an officer of Constructora, S.A., in the sum of $225, plus reasonable value of Mr. Newman's legal services in prosecuting the third party claim, which is alleged in the complaint to be the sum of $500. In fact, I believe that he alleges that that sum was paid to him——

Mr. Newman: Excuse me, Mr. Young. It was stipulated that the court would fix, from an exami-

nation of the third party file claim, the reasonable services we would be entitled to.

Mr. Young: That is correct. And I am calling attention [12] to the allegation of the plaintiff that that sum is $500.

The Court: The gist of your objection is that the plaintiff, if he is entitled to recover, is entitled to recover only his expenses in regaining the property, together with interest and attorney fees, and interest on that money?

Mr. Young: Yes, your Honor; and also the traveling expenses of the man that came up here, in the sum of $225.

The Court: I don't think that objection is well taken at all. I don't see any merit to that. The objection is overruled.

If that contention was right, no man would have the right to recover for the loss of use of his property.

I read your brief, and those cases that you cite in support of that are cases where a person was suing for the value of his property, and the court said when he gets his property back that is in mitigation of the loss he suffered of being deprived of his property. But it certainly doesn't answer the question as to loss of use, so the objection will be overruled and I will accept the stipulation.

Mr. Newman: Plaintiff rests.

The Court: In your pretrial statement of facts there are two other items, aren't there, the matter of attorney fees and expenses?

Mr. Newman: Which we have agreed upon, your Honor.

The Court: The pretrial stipulation shows the expenses [13] were $225, and the court under the stipulation is to determine a reasonable counsel fee in the third party claim.

Mr. Newman: That is correct.

The Court: And a sum not exceeding that alleged to have been paid?

Mr. Newman: That is correct.

The Court: So the court is to fix a reasonable attorney fee not exceeding $500. Is that right?

Mr. Newman: That's correct, your Honor.

The Court: All right. Plaintiff rests.

I understand that that stipulation, when you fixed the one day rate, the one day rate was only to apply if the detention was for five days or less?

Mr. Newman: If the contract for the hiring of the chattel was for five days or less. the only way these gentlemen could help us would be to say if they were renting the equipment they would rent it on the following basis.

The Court: In other words. if they were renting it and were renting it for five days or less, they would have to pay the figure shown; if they were renting it for two weeks, at least. they would pay on a weekly basis; if they were renting it for more than a month, they would pay on a monthly basis?

Mr. Newman: That is correct.

The Court: I understand. [14]

Mr. Young: Your Honor, at this time I wish to move for a judgment of nonsuit on behalf of the

defendant, and also for judgment at this time on the evidence adduced, for the reason that so far as the plaintiff's case appears, this case represents one of damage without injury, assuming that legal liability exists for levying of the writ of garnishment, on the ground that it appears that the first time the plaintiff made known his position to the defendant that it claimed title paramount was on May 9th, and that on May 10th by the action of the defendant the plaintiff was entitled to have possession of its equipment, except for the fact of the restraining order issued by the Superior Court, and that the detention after May 10th is referable exclusively to the restraining order, and therefore under those circumstances the recovery of plaintiff in this action would be strictly on the basis of nominal damage, or as a mattter of fact damage without injury, because the only actionable period in which he was damaged by the position I have taken is for the one day. Furthermore, there is no evidence or showing as to when—on behalf of the plaintiff—as to when he was entitled to possession, notwithstanding his ownership.

In other words, two separate entities exist with reference to enjoying the property; one, the ownership of title, and the other the ownership of possession.

One of the stipulations in the case, as we know it, is [15] that on the day that this garnishment was served, February 24, 1949, the plaintiff, a Mexican corporation, engaged in business in Mexico, was not lawfully entitled to possess the equipment in

Mexico, by virtue of its presence in the United States, and having not received at that time a valid consent from the Government respecting its exportation, that having not been received, according to the stipulation, until sometime in March——

Mr. Newman: May I interrupt you, Mr. Young?

The Court: There is nothing to prevent the plaintiff corporation from having possessed and used the equipment in this country, is there?

Mr. Young: No, except that there is no showing that they suffered any compensatory damages by virtue of their possession of it in this country. Under the authorities that I have cited to your Honor damages must be compensatory, and they must show that they had an oportunity to enjoy its use in a pecuniary way. And the mere naked possession of it without being financially prejudiced would, in my opinion, violate the principles of the law of damages as laid down by the Federal Court.

The Court: I can't agree with you. When plaintiff proved that it owned the equipment, I think the inference would flow from ownership of the right of possession. I think the burden would be upon you to prove—if it didn't have a right of [16] possession, to so prove that, so I am not concerned with that point.

Now, as to making proof of the use that it would put it to, I can't follow you on that. This is not a relic. It is a commonplace type of motor equipment. Suppose the Mexican corporation had been informed that it couldn't get its permit for six months or a year, don't you think it could have

gone out and made some contract and leased the equipment here in this state to some outfit that would have used it?

Mr. Newman: For the purpose of clarification, if the Court please, the permit was pertaining to a flat car permit, and not an export permit. [17]

The Court: Is that correct, that the permit involved was only for the use of a flat car and not the export of the grader itself?

Mr. Young: Counsel may be correct in that, your Honor. I haven't examined it in that light, but I will do so now, so that we can clarify that.

I don't believe that the documentary evidence that exists on that point is consistent with his statement.

Mr. Newman: You showed me, Mr. Young, a slip of paper at the pretrial hearing, which I believe was from some railroad board. Do you still have that with you?

Mr. Young: Yes, I have the application that was made on behalf of the Constructora to the Government in Washington with reference to this matter, and also the permit that was granted in response to that application.

Mr. Newman: What does the permit show?

Mr. Young: I think the permit has to be read in the light of the application.

The application says that, "We wish to make an application for a permit to have two flat cars loaded with equipment or machinery consigned to Constructora, S. A., of Mexico, cross into Mexico," then they go on to describe the importance of the equip-

ment and its delivery to Mexico. So it seems to me that the permit relates to the propriety——

The Court: There is no stipulation, at any rate, on that [18] point.

Now, as to your next point, that assuming there was a valid deprivation of the plaintiff's right to use, your point that plaintiff has no rights until it files its third party claim, I can't follow you on that.

If I own a car or piece of property and you wrongfully take possession of it, my right accrues when you take possession of it. I wouldn't even have to make a claim. I could wait six months and then sue you for trespass, as I read the cases.

As to your point that after the date of the injunction on May 10th, that is a nice point.

I did a lot of work last night on that. That is a nice point of law, and here is what I have discovered and concluded.

I found one other case that you gentlemen didn't cite. It is the case of Breard v. Lee, 192 Fed. Rep. 72. It is listed as being in the Circuit Court in the Northern District of California in 1911; however, it is a decision by Van Fleet, District Judge, on a demurrer.

Maybe in 1911 this Court in California was called a Circuit Court. But it appears to be a trial court decision by Van Fleet. And the Court says:

"The complaint in this case counts in trespass for damages suffered by the wrongful seizure and conversion of certain personal property belonging to [19] plaintiff under a writ of attachment. De-

fendant has demurred thereto on several grounds, which may be briefly noticed.

"After alleging the ownership of the property in plaintiff, and certain facts by way of inducement of special damage as to the particular use to which it was destined and specially valuable to plaintiff at the time, it is alleged, in substance, that the defendant, with full knowledge of the plaintiff's ownership and of the particular use for which he intended it, caused and directed the property to be seized and taken under a writ of attachment issued in an action by defendant against a third party; that the defendant in such attachment had no interest of any character in said property, of which fact this defendant was informed, and a demand duly made upon him for the release of the attachment, but which demand was refused; that the property was not taken inadvertently or by mistake, but that it was knowingly, willfully and wrongfully levied upon and seized at defendant's said direction, with the purpose by the latter to harass, injure, and oppress the plaintiff; and that defendant was actuated in the premises by malice. Damages both actual and exemplary are alleged and prayed." [20]

The court is there reciting the complaint.

"Wherein, under well established principles, these facts are lacking in the essentials of a cause of action for a tortious taking and conversion of property, is not readily to be perceived. Certainly no question is better settled by the course of decision generally under our system than that one who takes the property of another without right,

whether under color of official authority or otherwise, is guilty of a wrongful and tortious act, and that an action in the nature of either trespass, trover, or replevin will lie for its correction. This is true as well where the property is taken under a supposed claim of right as where the taking is with knowledge of the wrong, since in either case the trespasser acts at his peril. And one who directs the taking by an officer executing a writ of property not rightfully subject thereto is equally guilty of the wrong committed as the officer who executes the writ. In such an instance both the officer and the one who directs the taking are joint tort feasors, and either one or both may be held responsible by the owner at his election. These principles are so fully established as to require no elaborate citation of authorities in their support." [21]

Then I am impressed by the decision of Judge Shinn which is cited in Plaintiff's brief. McPheeters v. Bateman, 11 Cal. App. 2d. There Judge Shinn distinguishes between a situation where an action is brought by "A" against "B" and "B's" property is attached, and an action by "A" against "B" where "C's" property is attached, and makes what amounts to an exception in a case of an attachment. I will come in a minute to the injunction problem.

As I read that case and the case I have just cited, where "A" sues "B," and a third party's property is attached, that third party has an action at law for trespass. Where "A" sues "B" and "B's" property is attached, "B" is apparently relegated

to either an action for malicious prosecution, abuse of process, which is very similar, or an action on the attachment bond. Nowhere have I seen spelled out particularly the rationale of that distinction. But it seems to me logically that there is a rationale for that exception, and this is what I think it is:

The law apparently is tolerant in permitting plaintiffs to sue when they assert a claimed right. That is as it ought to be, a person should be under no particular burden if he wants to bring a lawsuit. There are exceptions, such as libel and slander, where a bond is required, or cases of nonresidents where a bond is required. But ordinarily plaintiffs should be free to bring a suit. On the other hand, the defendant [22] who is sued should not be entitled to turn around after the conclusion of the first suit and then sue the plaintiff for wrongfully bringing the action. He shouldn't be entitled to do it easily. So the law has put an extra burden on that defendant, and has said, "If you want to sue that man who sued you, you have got to either sue upon some undertaking that he issued, or you have to sue for malicious prosecution or abuse of process, in which event the law is going to put an additional burden upon you. You are going to have to show that there was no probable cause for bringing the action in the first instance, the first action, then you are going to have to show malice."

Now, that makes sense. A plaintiff is allowed to bring his suit. A defendant can't retaliate, unless he bears an additional burden and makes such showing.

Why is there an exception where a third party is involved? The third party is an innocent bystander. His property has been attached, we will assume for argument, improperly or wrongfully, and why should he be under the burden of proving lack of probable cause and malice? He is not a party to that action; he wasn't a party to be controversy; he is brought in, as it were, from the outside, so the law says as to him you don't have the same burden that the defendant has, you don't have to prove probable cause, the lack of probable cause and malice, you may sue in trespass, because you as a third [23] party had your property trespassed upon.

It seems to me that is the rationale of the distinction of the attachment cases. And it seems to me, therefore, that where the attachment runs against "C," "C's" property, where the suit is between "A" and "B," that "C" has that cause of action without proving malice and without proving probable cause.

Mr. Young: However, for actual damages only.

The Court: Yes, certainly. [24]

* * *

But if the rationale on attachment is logical, then the same thing, it seems to me, should apply to injunction. Attachment and injunction are both extraordinary remedies, ancillary remedies to an action, and both may have the same effect, as in this case the garnishment, the attachment of property, the injunction against its disposal would have the same effect.

If the logic in the attachment cases is good, why doesn't the same logic apply to injunction? And, accordingly, it is my conclusion, and this is tentative at this stage of the case, as I expect to do some more work on this as the case progresses, my tentative opinion is that where a third party is affected by the injunction he has his action without having to prove lack of probable cause, and without having to prove malice, and that the rule in the attachment cases should apply to injunction as well. If that is true, therefore, under the stipulated facts the defendant caused the injunction to be issued, by which the plaintiff was restrained from having the use of his property, and I think the plaintiff has a cause of action independent of any bond which doesn't exist here, and without proving malice and without proving lack of probable cause.

That may not dispose of all of your contentions, but the ruling of the court is that the motion by the defendant is denied, without prejudice to your renewal of some motion [25] that would have like effect as we progress with the case.

Do I make myself clear?

Mr. Young: Yes.

The Court: All right. [26]

* * *

Mr. Young: Your Honor, I believe before defendant rests that there is one stipulation that defendant would like to have the benefit of.

I believe in response to my inquiries of Mr. Newman that he may be willing to subscribe to the stipulation that the plaintiff in this action was

financially sound and able to employ attorneys or procure bonds or expend monies that may have been indicated or desirable in pursuing and recovering the possession of this motor grader.

Mr. Newman: Without any prejudice to the plaintiffs we so stipulate, for whatever it is worth.

The Court: It may be considered a part of the record in the case prior to the time that the plaintiff rested and prior to the time that the defendant made its motion. [35]

* * *

The Court: Mr. Young, before you start arguing, it might be of some help to you, one of these points I mentioned before the adjournment was this point concerning the jurisdiction of the Superior Court, based upon those cases you cite, and I think I understand your position and that is although those cases you cite were cases involving money, sort of an inference from those cases is that if the property is not in the possession of the attaching officer, garnisheeing officer, then it is not a proper case for a third party claim.

Mr. Young: That is my position, yes.

The Court: I noticed in one of those cases, a decision by Judge Bishop, that he pointed out that although the claim wasn't proper because the money hadn't been paid to the sheriff, that had the money been paid the sheriff the third party claim would have properly laid.

Mr. Young: That is consistent with the theory that I have been advancing, that is, the sheriff must

have manual possession, whether it is property or money or whatever it may be.

The Court: I wanted to have your point in mind.

That point gave me some concern, and in reading 689 the section starts out, "If personal property levied on is claimed"—they use the word "levied" in that section. I am inclined to think that although those cases that you cite are probably [45] correct as far as money is concerned, I am inclined to give such interpretation to 689 because of the use of the word "levied" as would include cases where the property was not in the possession of a sheriff.

I tried to find some definition of "levied," and there is no definition as such set forth in the C.C.P. However, from what checking I did I come to the conclusion that the word "levy" means the execution of a writ. The word "levy" means the execution of a writ of attachment, a writ of execution. And that conclusion is fortified, or I am led to that conclusion by other sections throughout the C.C.P.

For instance, if you look in the index of C.C.P. under "levy," they refer you to attachment, execution, claim and delivery. Then you look under those sections of the index and you find sub-section levy, and under it you will find the sections describing how the officer is to execute the writ.

Now, of course the index is not part of the code; it is just done by somebody who compiled an index. I realize that, but if you read those sections over I am inclined to believe that the word "levy" means execution of a writ.

542b is particularly helpful on the definition of the word "levy." It reads as follows:

"An attachment or garnishment on personal property, whether heretofore levied or hereafter to be levied, * * *" [46]

In other words, there is the word "levied" in connection with garnishment.

542b, by the way, concerns only the length of time. But they use the word "attachment" or "garnishment" of personal property whether heretofore levied or hereafter to be levied, and so forth.

I, therefore, unless you can persuade me otherwise, think that the word "levy" in 689 is broad enough to cover a garnishment situation where the property has not been brought into the possession of the attaching officer, the garnisheeing officer. [47]

* * *

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 17th day of December A.D., 1952.

/s/ SAMUEL GOLDSTEIN,
Official Reporter.

[Endorsed]: Filed December 18, 1952.

DEFENDANTS' EXHIBIT A

Sh-Ci-56

Case No. 556290

W. W. SHEPHERD, et al.,

Plaintiff(s),

vs.

JULIO A. VILLASENOR, Doing Business Under the Firm Names and Styles of Juavi Export Co. and Juavi Fibres Company,

Defendant(s).

To notice of garnishment and demand for a statement served on me this 26th day of February, 1949, by the Seriff of Los Angeles County, under and by virtue of a Writ issued in the above-entitled action, my (our) answer is: That I am (we are) indebted to said defendants, in the sum of $ .... and that I (we) have in my (our) possession and under my (our) control personal property belonging to said defendant(s), to wit: one caterpillar 12 Diesel Motor Grader, Serial 9K7086.

Signed:

BELYEA TRUCK CO.,

By /s/ [Indistinguishable.]

Dated: 8-4-49.

Please Return This Answer to Garnishment (In Duplicate) to Sheriff, Civil Division, 206 Hall of Justice, Los Angeles 12, California, Promptly.

Admitted in evidence March 4, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 40, inclusive, contain the original Complaint; Amended Answer; Amendment to Complaint; Stipulation of Facts and Issues and Pre-Trial Order; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Designation of Record on Appeal and Order Extending Time to Docket Appeal and a full, true and correct copy of Minutes of the Court for February 11, 1952, and April 29, 1952, which, together with reporter's transcript of proceedings on trial and the original exhibits, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 19th day of December, A.D. 1952.

[Seal] EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13669. United States Court of Appeals for the Ninth Circuit. W. W. Shepherd and Norman D. Shepherd, Co-Partners, Doing Business as Shepherd Tractor & Equipment Co., Appellants, vs. Constructora, S. A., a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 22, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals,
Ninth Circuit

No. 13669

CONSTRUCTORA, S. A., a Corporation,
Respondent,

vs.

W. W. SHEPHERD and NORMA D. SHEPHERD, Co-Partners Doing Business as SHEPHERD TRACTOR & EQUIPMENT CO., a Co-Partnership,
Appellants.

STATEMENT OF POINTS ON WHICH APPELLANTS RELY

The following concise statement is submitted by appellants as the points on which they intend to rely on the appeal herein; viz,

1. The judgment in the third party claim proceeding is void for lack of jurisdiction.

2. No valid attachment resulted from the service of the garnishment.

3. The motion for a judgment of nonsuit should have been granted.

4. Amount of damages recoverable is limted to period the motorgrader would have been in actual service.

5. The proper measure of damages is the expense in recovering the motorgrader.

6. Damages for loss of use of motorgrader erroneously awarded for period during which injunction was effective.

7. Respondent's asserted loss of use resulted from the negligence (or laches) of its bailee and itself.

* * *

Respectfully submitted,

/s/ WILLIAM K. YOUNG,
Attorney for Appellants.

[Endorsed]: Filed December 29, 1952.

No. 13669

United States Court of Appeals for the Ninth Circuit.

W. W. SHEPHERD and NORMA D. SHEPHERD, Co-Partners, Doing Business as Shepherd Tractor & Equipment Co.,

Appellants,

vs.

CONSTRUCTORA, S. A., a Corporation,

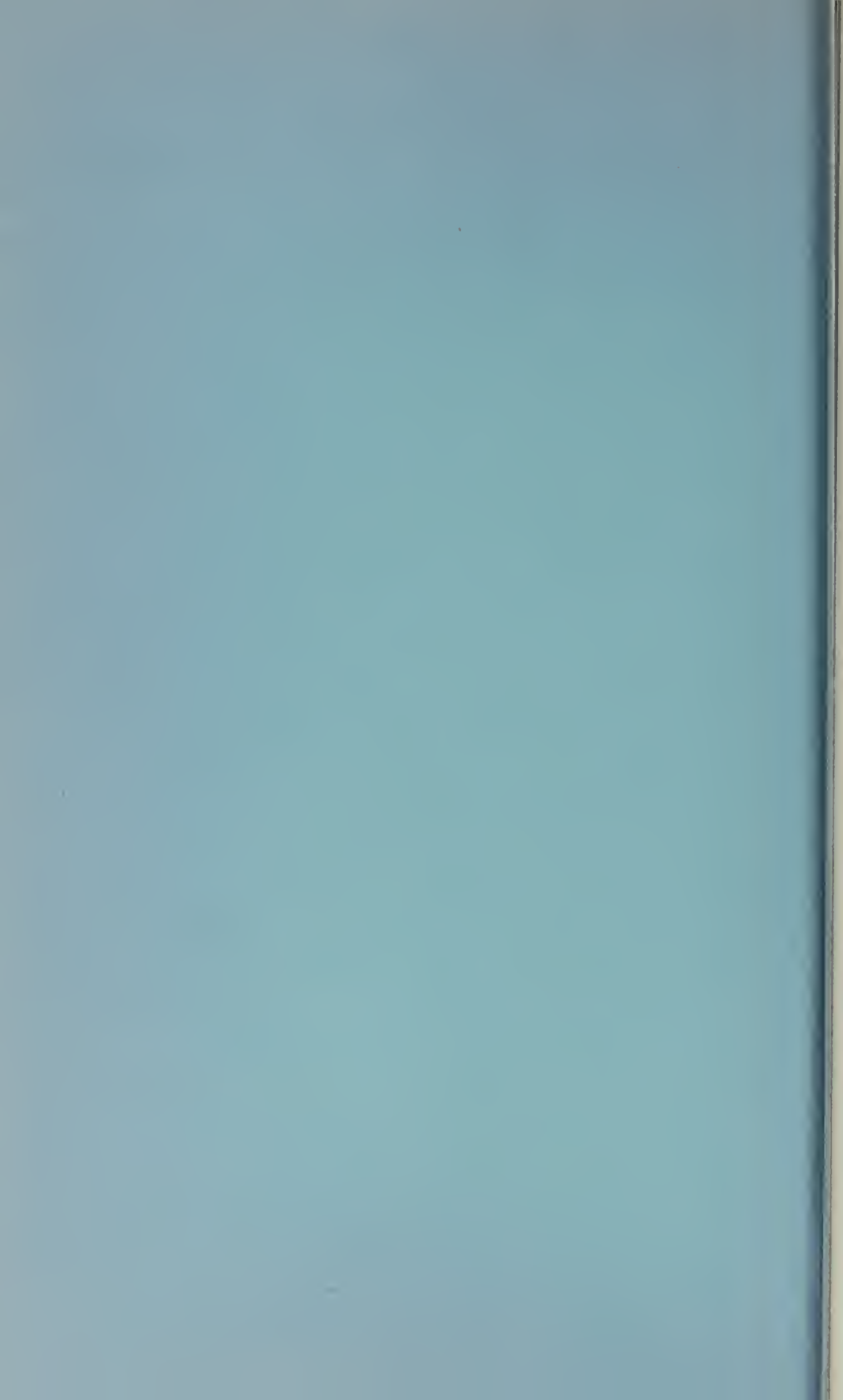
Appellee.

Supplemental Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

FILED
AUG 5 1953
PAUL P. O'BRIEN
CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—7-31-53



No. 13669

United States Court of Appeals for the Ninth Circuit.

W. W. SHEPHERD and NORMA D. SHEPHERD, Co-Partners, Doing Business as Shepherd Tractor & Equipment Co.,

Appellants,

vs.

CONSTRUCTORA, S. A., a Corporation,

Appellee.

Supplemental Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—7-31-53

APPEARANCES

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In the United States District Court, Southern District of California, Central Division

No. 12890-C

CONSTRUCTORA, S. A., a Corporation,

Plaintiff,

vs.

W. W. SHEPHERD, et al.,

Defendants.

Carter, James M., District Judge.

OPINION

This opinion concerns the scope of Sec. 689, Code of Civil Procedure of the State of California, and the question of the jurisdiction of the Superior Court to try title to personal property capable of manual delivery which has been garnished and attached in the hands of third parties. Jurisdiction of this court is based on diversity of citizenship, and a claim that the amount of the controversy exceeds $3,000.

I.

Statement of Facts

This is an action in trespass to personal property, brought by Constructora, S. A., a Mexican corporation, hereinafter referred to as "Constructora" against W. W. Shepherd and Norma D. Shepherd, co-partners, doing business as Shepherd Tractor & Equipment Co., hereinafter referred to as "Shepherd," arising out of the wrongful garnishment of personal property.

On February 25, 1949, Shepherd filed an action against one, Julio A. Villasenor, hereinafter referred to as "Villasenor" in the Superior Court, County of Los Angeles, State of California, to recover on a promissory note, case No. 556290. On the same day Shepherd directed the Sheriff to garnishee a certain motor grader in the possession of Belyea Trucking Company, hereinafter referred to as "Belyea."

On February 26, 1949, the Sheriff garnisheed the motor grader and made his return on March 17, 1949. On May 9, 1949, Constructora filed a third party claim with the Sheriff, stating that it had purchased the motor grader on June 10, 1948, from Villasenor and that it was being held by Belyea pending shipment to Mexico. This third party claim was filed pursuant to Sec. 689, C.C.P. On May 10, the Sheriff notified Shepherd of the third party claim and on that day Shepherd refused to put up the bond required by Sec. 689 C.C.P. and petitioned the Superior Court for a temporary restraining order pending the determination of the title to the motor grader. Pursuant to the petition for a temporary restraining order the Superior Court on that day granted same and prohibited Constructora, its agents and/or defendant from transferring, encumbering or making any other disposition of the motor grader or from removing the same from its present location. The matter was set for trial in the Superior Court on June 3, 1949. On August 17, 1949, a judgment was entered declaring title to the motor grader to be in Construc-

tora and ordering the release of same to Constructora.

On February 20, 1951, Constructora filed the present action against Shepherd for trespass to personal property.

In the trial brief filed by defendants many issues are raised, the primary issue being whether or not there was a valid levy of a writ of attachment on the motor grader. Defendant contends that (1) there was no valid levy of writ of attachment on the motor grader, and (2) that since no valid levy existed, the plaintiff, Constructora, could not try title under Sec. 689 C.C.P. and therefore the Superior Court had no jurisdiction to make its determination under that section. The answer to this contention involves an analysis of the Code sections relating to attachments as provided by the Code of Civil Procedure of the State of California, and a determination of the legal rights of an innocent third party whose property has been attached or garnisheed, pursuant to those sections.

II.

Statutory Provisions Regarding Attachment Procedures

The California Code of Civil Procedure provides by sections 537 to 561 the manner in which various types of property may be attached. Sec. 539(a) C.C.P. provides for attachment of a bank account or property in a safe deposit vault, not standing

in the name of the defendant or in the name of a defendant and other persons. In speaking of the manner in which this is to be done, the section provides that the provisions of this section and of section 539 [requiring a bond] shall be complied with, otherwise the "levy" shall not be effectual for any purpose and shall be disregarded. It is important to note here that the Code speaks of the "attachment" and "levy," even though the proceeding is a garnishment proceeding as to the persons other than the defendants.

Sec. 542 C.C.P. deals with the manner in which both real and personal property may be attached, but contains no provision regarding movable personal property which is in the hands of a third person. Subdivision (3) of this section relied upon by defendants to support their contention that before a valid attachment can result, the Sheriff must take actual physical possession of the property, pertains to personal property capable of manual delivery in the possession of the defendant. This section obviously can have no application to the facts before the court, since the personal property involved, i.e. the motor grader, was not in the hands of Villasenor, the defendant in the Superior Court action, but was in the hands of Belyea. Therefore it appears clear that the Sheriff had no authority, pursuant to this section to take actual physical custody of the motor grader.

We consider next Sec. 543, C.C.P., referring to

personal property in the hands of a third person. It provides as follows:

> "§543. [Garnishment] Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession, or under his control, any credits or other personal property belonging to the defendant, or owes any debt to the defendant, the sheriff, constable, or marshal must serve upon such person a copy of the writ, and a notice that such credits, or other property or debts, as the case may be, are attached in pursuance of such writ. [Enacted 1872; Am. Stats. 1933, p. 1863]" [Emphasis ours.]

Sec. 549 C.C.P. then provides that:

> "In cases where a third person claims, as his property, any personal property attached, the rules and proceedings applicable in cases of third party claims after levy under execution shall apply," referring us to Sec. 689 C.C.P.

From the above the court concludes:

1. That a garnishment is an attachment[1] even though personal property capable of manual delivery is not taken into the possession of the Sheriff, and

2. That the levy of a garnishment is made by serving on the person having possession of the personal property a copy of the writ and a notice that

[1]Steineck v. Haas-Baruch Co. 106 Cal. App. 228-231; Finch v. Finch, 12 Cal. App. 274, 107 Pac. 594.

the property is under attachment. No other method of attaching property in the hands of a third person is prescribed by the Codes.

III.

Analysis of the Cases Holding That No Action Can Be Brought Under Sec. 689 C.C.P.

The question then arises—may a third party claimant whose tangible personal property has been attached by way of garnishment, bring an action to determine title pursuant to Sec. 689 C.C.P.? Defendant contends that under the case law interpreting the section, no such action can be maintained; citing:

1st National Bank v. Kinslow,
8 Cal. (2) 339;

Bank of America v. Riggs,
39 Cal. App. (2) 679;

Partch v. Adams,
55 Cal. App. (2) 1;

Sunset Realty Co. v. Dadmun,
34 Cal. App. (2) Supp. 733.[2]

With this contention the court does not agree, since the cases cited are distinguishable from the facts of the present case.

It would be an easy answer to point out that the cases cited above, (except the Kinslow case) holding no jurisdiction in the Superior Court under Sec.

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[2]Ballagh v. Williams, (1942) 50 Cal. App. (2) 303, to the same effect (corporate stock).

689 C.C.P. are all cases involving levies on debts or corporate stock; and in no case was there any interference with the possession of the debt or the stock interest brought about by the levy; and that therefore these cases are distinguishable from the case at bar, in that here there was an interference with the possession of the grader.

Sec. 544 C.C.P. makes the garnishee liable to the plaintiff during the life of the attachment unless he complies with the garnishment notice. Obviously, Belyea would not therefore turn the grader over to Constructora. Whether the garnishment created a lien on defendant's title to the property in the hands of the garnishee, may be in doubt. Sec. 542b C.C.P. is indicative of a lien of some sort for the duration of the attachment. However, Sec. 542b C.C.P. does not use the word "lien," while Sec. 542 C.C.P. relating to real estate, expressly refers to a lien. There is authority indicating that a lien of some sort is created by a garnishment. 15 Cal. Jur. p. 1044, Levy and Seizure, Sec. 50; Kimball v. Richardson-Kimball, 111 Cal. 386 at 393. Puissegur v. Yarbrough, 29 Cal. (2) 409 at 412; 175 Pac. (2) 830.[3] It would appear that in addition to the

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[3]But see 13 Cal. Jur. 3; Garnishment, Sec. 2, which states that "the plaintiff does not acquire a clear and full lien upon the specific property in the garnishee's possession * * *" quoting Finch v. Finch, 12 Cal. App. 274 at 281. In Finch v. Western National Bank, 24 Cal. App. 336, the court in referring to Sec. 544 C.C.P. states: "The obvious purpose of said action is to preserve the integrity of the lien of the attachment or garnishment in

personal liability of the garnishee under Sec. 544 C.C.P. there is in substance, a lien created by Sec. 542b C.C.P., which would further interfere with Constructora's right to possession of its grader.

But because of the general language used in the cases relied upon by the defendant, it is necessary to consider the problem further.

We start with Sec. 689 C.C.P. In part it reads, "If personal property levied on is claimed by a third person as his property by a written claim * * * setting out the reasonable value thereof, his title and right to the possession thereof * * *"

The third party claimant, to invoke Sec. 689 C.C.P. must allege his right to the possession of the "res" levied upon. In the case of stocks the levy is made under Sec. 542(4) C.C.P. and it consists of leaving with a designated officer of the corporation, a copy of the writ and a notice that the stock is attached in pursuance of said writ. The tangible shares if issued, are not molested. The writ operates against the issuing agency. What is attached is the stock interest in the corporation, which is intangible. Thus, technically, the third party claimant cannot satisfy Sec. 689 C.C.P. and allege his right to possession of this intangible interest. The decisions in the above cases logically follow.

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such cases, and thus render efficacious * * * any judgment which the plaintiff may secure against the defendant * * *" See also Steineck v. Haas-Baruch Co. 106 Cal. App. 228 at 231, quoting from Finch v. Finch, (supra).

In the case of a debt or credit the levy is made under Sec. 542(6) C.C.P. The subdivision describes how, "Debts and credits and other personal property, not capable of manual delivery * * * are attached, viz, by leaving with the person owing the debt or having in his possession or control the credit or other personal property (not capable of manual delivery) a copy of the writ, a notice, and in certain cases, a copy of the complaint.

The person entitled to the debt or credit is not entitled to the possession thereof. He has a right to the debt or credit, or more properly, the money represented thereby. Nor could he ever have possession of the debt or credit. Once it was paid it would no longer be a debt or a credit. In addition Sec. 542(6) C.C.P. would apply to debts and credits not due as well as to those that were already due. As to those not due, the third party claimant would not even be entitled to the immediate payment of the money.

Thus, the third party claimant could not satisfy Sec. 689 C.C.P. and allege his right to possession of the debt or credit. The decisions in the above cases logically follow.

We turn to First National Bank v. Kinslow, (supra) the first case decided by the California courts holding that a third party claimant could not bring an action under Sec. 689 C.C.P. There the First National Bank obtained a judgment against Lenora Kinslow and directed the Sheriff to execute on certain real property. Walter T. and Henry M. Kinslow then filed a third party claim

pursuant to Sec. 689 C.C.P. claiming that the property belonged to them. At the time the action was filed, Sec. 689 C.C.P. was substantially different. The wording of the section as of that date is set forth in the margin.[4]

The notable differences between the section as it read at the time of the Kinslow case and as it now reads are:

1. It then referred to property; it now refers only to personal property, and

2. It then could be used to determine only the right to possession of the property, whereas now it can be used to determine the reasonable value of the property, the claimant's title to the property and his right to possession of the property.

The reasons given by the Supreme Court in the Kinslow case for holding that Sec. 689 C.C.P. did not apply to real property, were as follows:

1. The court said that the only issue to be determined was the right to possession; that since the property involved was real property, all that occurs

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[4]Sec. 689 C.C.P. "Third Party Claim. Undertaking. If the property levied on is claimed by a third person as his property by a written claim verified by his oath or that of his agent, setting out his right to the possession thereof, and served upon the officer making the levy, such officer must release the property if the plaintiff, or the person in whose favor the writ of execution runs, fails within five days after written demand, to give such officer an undertaking executed by at least two good and sufficient sureties in a sum equal to double the value of the property levied on * * *" (Stats. 1933, p. 1887.)

at the time of the execution is the granting of a lien on the property and possession is not disturbed.

2. The court held that even though the execution referred to property without differentiating between real or personal property, because of the subsequent language found in the section, it concluded that the legislature only intended it to apply to personal property. It can readily be seen that the Kinslow case is not authority for the contention of defendants here, since (1) the case applied to real property and (2) since Sec. 689 C.C.P. as it then read applied only to possession whereas it was subsequently amended to try title as well as possession.

Certain of the California cases have followed the Kinslow case without analysing the distinction between the statute as it existed at the time of the Kinslow case and as it presently exists. They conclude that the only time Sec. 689 C.C.P. is applicable is when a Sheriff takes actual physical possession of the property. The reason given for this conclusion is that one of the primary purposes of Sec. 689 C.C.P. was to protect the Sheriff from liability, and since no protection is needed by the Sheriff on a garnishment, then Sec. 689 C.C.P. is not applicable.

This reasoning however, completely disregards the mandate of the statute and completely overlooks the amendments made to Sec. 689 C.C.P. and the purpose of those amendments. As it now reads, Sec. 689 C.C.P. is intended to provide a quick and efficient procedure for trying title to personal property, to prevent unnecessary delay and hardship to

innocent third parties whose property has been levied upon either by way of attachment, garnishment or execution. With this object and purpose in mind the legislature in amending Sec. 689 C.C.P. intended to protect not only the Sheriff from liability but also to provide and protect innocent third parties by giving them a quick and effectual remedy to clear title and to regain possession of their property.

In the Dadmun case, (supra) the Appellate department of the Superior Court recognized the changes made by the amendments to Sec. 689 C.C.P. and discussed them in detail. The court held that under the language of Sec. 689 C.C.P. this section had no application to the garnishment of a "debt." The court said, at p. 741:

> "It is difficult to see how anyone of these three matters (possession, title and value) becomes of moment in the situation created by the mere garnishment of a debt. Certainly the right to its possession is no more involved than is the right to the possession of real estate involved when a levy is made upon it, that is to say, not at all * * * Perhaps it would be begging the question we are discussing to say that the reasonable value of, and title to, the debt are not brought into question. In any event, the contents required to be set forth in the claim which has to be filed with the levying officer are all matters which are of no interest to him where the only effect of his levy is to garnishee a debt."

The court in Sunset Realty Co. v. Dadmun, (supra) limited its decision to apply only to a levy on a debt.

We have been unable to find any case in which a third party claimant in the situation of the plaintiff herein, where the possession of his chattels has been interfered with, has been denied the right to pursue his third party claim under Sec. 689 C.C.P. nor do we find any case which specifically considers the problem. The analogy to the cases involving debts and corporate stock is not sound since the third party claimant cannot, in debt and stock situations, assert a right to possession. Here the third party claimant, had a right to the possession of the grader and that possession was interfered with by the levy and the lien thereby created, which prevented it from obtaining or using its property.

The court concludes that Sec. 689 C.C.P. provided a proper method under the present set of facts, to determine the issue of title, right to possession and value of the motor grader, and that the Superior Court had jurisdiction to determine such issues. Hence the judgment roll in the Superior Court action was properly before this court and the decision of the Superior Court in favor of the third party claimant, becomes the basis for plaintiff's recovery in this action.

Nunc pro tunc September 19, 1952.

[Endorsed]: Filed June 5, 1953.

A true copy attest, etc., June 15, 1953.

[Endorsed]: No. 13669. United States Court of Appeals for the Ninth Circuit. W. W. Shepherd and Norma D. Shepherd, Co-Partners, Doing Business as Shepherd Tractor & Equipment Co., Appellants, vs. Constructora, S. A., a Corporation, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 17, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 13669

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

W. W. SHEPHERD and NORMA D. SHEPHERD, Co-partners, Doing Business as Shepherd Tractor & Equipment Co.,

Appellants,

vs.

CONSTRUCTORA, S. A., a Corporation,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANTS' OPENING BRIEF.

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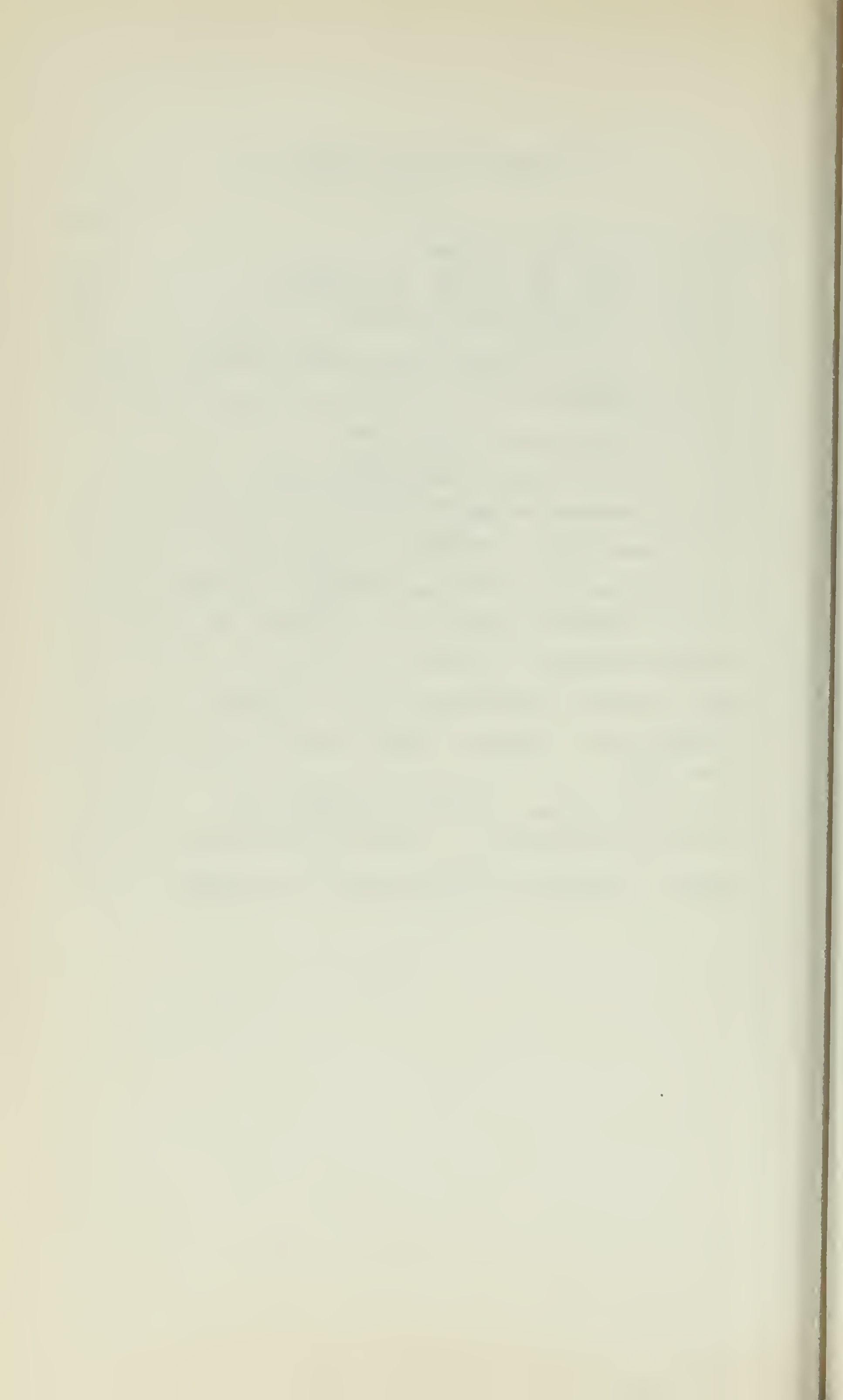


No. 13669

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

W. W. SHEPHERD and NORMA D. SHEPHERD, Co-partners, Doing Business as Shepherd Tractor & Equipment Co.,

Appellants,

vs.

CONSTRUCTORA, S. A., a Corporation,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANTS' OPENING BRIEF.

Statement of the Pleadings and Facts Relating to Jurisdiction.

Appellee is a citizen of the Republic of Mexico and appellants are residents of the County of Los Angeles, State of California. The amount in controversy exceeds $3,000.00. [Tr. pp. 3 and 4.] The trial court had jurisdiction. (Title 28 U. S. C., Sec. 1332.) The appeal is from a final decision [Tr. p. 33], hence this court has jurisdiction. (Title 28 U. S. C., Sec. 1291.)

Statement of the Case.

An action was brought in the Superior Court of the State of California in and for the County of Los Angeles by appellants against Julio A. Villasenor to recover a

money judgment. [Tr. p. 17.] That in said action and on February 25, 1949, appellant instructed the sheriff of Los Angeles County, pursuant to a Writ of Attachment issued therein, to garnishee personal property in the possession of and under the control of Belyea Truck Company belonging to said defendant Villasenor, and to require a statement in writing from said garnishee. [Tr. pp. 13, 17.] On August 4, 1949, an answer was furnished by the garnishee to the sheriff that it had in its possession a motor grader belonging to the defendants. [Tr. p. 64.] The sheriff did not at any time obtain physical possession of the motor grader, nor did he place a keeper in charge thereof. [Tr. pp. 47-48.]

Prior to February 26, 1949, defendant Villasenor had caused the motor grader to be deposited with Shaw Sales & Service Co. of Los Angeles, California, where the same remained until February 24, 1949, when it was moved to and remained at the yard of Belyea Truck Company until the service of the notice of garnishment mentioned. [Tr. pp. 12, 13.] On May 9, 1949, appellee filed an instrument denominated "Third Party Claim" with the sheriff of Los Angeles County. [Tr. pp. 17, 42-44.] On May 10, 1949, said sheriff demanded of appellant an undertaking on said alleged third party claim. [Tr. pp. 17, 42.] On May 10, 1949, appellants expressly declined to furnish the undertaking demanded of them by the sheriff. [Tr. p. 18.]

On May 10, 1949, appellants filed with said State court a petition to determine the title of said motor grader and for an order restraining the transfer or removal thereof pending said determination. [Tr. pp. 18, 38-39.] The hearing on said petition was set by the court for May 23, 1949, and pending its determination the court enjoined

appellee as requested, no bond being required therefor. [Tr. pp. 18, 40-41.] On June 3, 1949, the petition of the appellant was heard by the State court and on August 17, 1949, it was adjudged that appellee was the owner and entitled to the possession of the motor grader and the sheriff was ordered to release the same to it. [Tr. pp. 18, 45-46.]

The net rental value of the motor grader is $381.40 per month; $148.00 per week on the basis of two weeks or less; $30.20 per day not exceeding five days. [Tr. p. 48.] Appellee's expense in pursuing the motor grader was $225.00. [Tr. p. 19.] A reasonable attorney's fee for appellee would not exceed $500.00. [Tr. p. 51.]

Specification of Errors.

1. The adjudication by the State court of appellee's right of possession to and ownership of motor grader was void for lack of jurisdiction.

2. The trial court erred in denying appellant's motion for a judgment of nonsuit.

3. Damages awarded were erroneously allowed and were also excessive.

(a) Measure of damages for wrongful garnishment is limited to expense of recovering motor grader.

(b) Damages for loss of use of a chattel are not recoverable unless evidence establishes that chattel would have been in use during period of deprivation.

(c) Appellee's failure to mitigate its damage prevents recovery thereof.

4. Damages for loss of use may not be awarded for a period during which injunction was in effect.

ARGUMENT.

I.

The Adjudication by the State Court of Appellee's Right of Possession to and Ownership of Motor Grader Was Void for Lack of Jurisdiction.

The court erred in receiving in evidence Appellant's Exhibit 1, which includes the Judgment *re* Third Party Claim. [Tr. pp. 37-47.] Appellee objected to the offer on the ground that it was apparent on the face of the pleadings in the State court action that the court had no jurisdiction. [Tr. pp. 36-37.]

The trial court erred in making the conclusion of law (IV) that the State court had jurisdiction to determine that appellee had title to and possession of the motor grader. [Tr. p. 31.] It is undisputed that the sheriff's identity with the attachment was restricted to the service of the notice of garnishment. A keeper was not placed in charge of the motor grader by the sheriff, nor did he take it into his possession. [Tr. pp. 47-48.]

The provisions of the California Statute relating to third party claims are found in Section 689 of the Code of Civil Procedure. In referring to this section in the case of *Bank of America v. Riggs,* 39 Cal. App. 2d 679, 104 P. 2d 125, the court said at page 683:

> "The history of said section is there elaborately reviewed and painstakingly treated. From such review, it is developed that the main purpose of the original section as contained in the Practice Act was to give protection to the officer who makes the levy against claims for damages by third parties. Clearly,

no damage can be shown as against the sheriff unless it be in those cases where he seizes and detains physical custody of movables held by him under levy.

* * * * * * * *

"The right of a third party claimant to try the title to an indebtedness due by a garnishee to such third party claimant received the studied consideration of the appellate department of the superior court in the case of Sunset Realty Co. v. Dadmun, 34 Cal. App. (2d) (Supp.) 733 (88 Pac. (2d) 947). Said opinion reviews the several code sections and the cases explanatory thereof. From a thorough review of the authorities, it is there made clear that when a debt is garnished, the right to collect it is vested thereafter solely in the judgment creditor (Sec. 544, Code Civ. Proc.), and when collected it is credited directly on the judgment. Inasmuch as the sheriff did not gain possession of the moneys owing, they remained in the same custody where they rested prior to the levies. To remove them an entirely new action was requisite."

In the case of *First National Bank v. Kinslow,* 8 Cal. 2d 339, 65 P. 2d 796, the court said at page 344:

"It is only when the officer levies upon personal property that the right to the possession arises. In most instances, when personal property capable of manual delivery is levied upon under execution, it is the duty of the officer to take physical possession of the property levied upon. It is then that a third person claiming said property must assert his claim, and unless he does so, according to a subsequent provision of said section, the officer is not liable to him in damages. Only when personal property is levied upon, can the serving of a third party claim have any force or effect, or result in any advantage to the person serving the same."

It is submitted that the foregoing authorities justify the conclusion that a valid third party claim under the California Statute cannot be filed unless the levying officer has taken possession of the chattel involved.

Notwithstanding the fact that the judgment in the third party claim proceeding appears valid on its face, its invalidity may be established by facts admitted by, or if no objection is made to the admissibility thereof, the party in whose favor the judgment was rendered.

> "However, to the rule just stated there is a well established exception which provides that although the judgment or order is valid on its face, if the party in favor of whom the judgment or order runs admits facts showing its invalidity, or, without objection on his part, evidence is admitted which clearly shows the existence of such facts, then it is the duty of the court to declare the judgment or order void."
>
> *Thompson v. Cook,* 20 Cal. 2d 564, 569, 127 P. 2d 909.

The foregoing authority justifies the conclusion that the third party claim judgment is void by reason of the fact that the motor grader was never in possession of the sheriff as admitted by appellee.

Inasmuch as appellee offered no evidence of its ownership of title and right of possession other than the judgment of the State court, there is no evidence justifying a finding or the conclusion of law mentioned that at the time of the service of the garnishment appellee was the owner and entitled to possession of the motor grader.

II.

The Trial Court Erred in Denying Appellant's Motion for a Judgment of Nonsuit.

At the close of appellee's case, appellant made a motion for a judgment of nonsuit which was denied. [Tr. p. 60.]

The motion for nonsuit should have been granted by reason of the failure of appellee to offer evidence other than the judgment in the third party claim proceeding, of its title and right to possession of the motor grader. [Tr. p. 52.]

It will be observed from the complaint herein that appellee predicated its claim of title and right of possession to the motor grader on the judgment in the third party claim proceeding. [Tr. p. 5.] There is no unqualified allegation in the complaint that at the time the garnishment was served appellee was the owner of and entitled to the possession of said motor grader. Nor was there any attempt on the part of appellee to introduce evidence to such effect other than the judgment mentioned.(7)

III.

Damages Awarded Were Erroneously Allowed and Were Also Excessive.

The judgment rendered herein for $2,898.70 was computed as follows:

$ 225.00	expenses incurred in purchasing chattel
500.00	attorney's fees of appellee herein
1,058.80	two months, fourteen days loss of use during garnishment period
1,114.90	three months, six days loss of use during injunction period
$2,898.70	Total

(a) Measure of Damages for Wrongful Garnishment Is Limited to Expense of Recovering Motor Grader.

In the absence of fraud, malice or oppression, damages sought for wrongful levy of process where the property wrongfully taken has been recovered, is limited to the expense of procuring its return with interest, its successful recovery being considered as having been received in mitigation of damages.(1)

The rule that damages accruing as a result of property wrongfully taken by process are limited to the expense of procuring the return of the property has been in effect since the year 1900.(2)

(b) Damages for Loss of Use of a Chattel Are Not Recoverable Unless Evidence Establishes That Chattel Would Have Been in Use During Period of Deprivation.

By its amended complaint appellee alleged that it was deprived of the use of the motor grader during the period following the garnishment. It was further alleged that appellee unsuccessfully sought to rent another similar motor grader. Appellee sought to recover as damages the reasonable rental cost of a similar motor grader in Los Angeles County during said period. [Tr. p. 15.] The reasonable rental value was stipulated, without prejudice. [Tr. p. 48.] There was no evidence that appellee, a Mexican corporation, lost an opportunity of putting the motor grader to any specific use in the County of Los Angeles during the period in question, assuming that it had possession thereof.

It was incumbent upon appellee to establish by the evidence the number of days during the period in question

that the motor grader could have been put to use in Los Angeles County, excluding from such computation such days on which the motor grader would not be operated because of holidays, etc., and days for which there was no work available to appellee for such type of equipment.(3)

(c) Appellee's Failure to Mitigate Its Damage Prevents Recovery Thereof.

If one knows that he is threatened with damage because of another's tort, it is his duty to do all that he reasonably can to minimize his damage, and if he fails to do so because of negligence or willfulness, the unnecessarily resulting enhanced damages cannot be recovered.(4)

The motor grader was garnished in the hands of Belyea Truck Co. on February 25, 1949. A period of two months and fourteen days was permitted to elapse by appellee until May 10, 1949, before it made known its claim of a paramount title and right to possession through the medium of a third party claim. Without permitting a day to elapse, appellants gave notice of its unwillingness to continue the garnishment in effect by refusing to furnish the sheriff with an undertaking. An injunction against the removal of the motor grader was obtained and notice thereof given to appellee's attorneys on May 10, 1949. Thereafter, appellee took no steps to modify the injunction or to require appellant to deposit an undertaking as a condition for the continuance of the injunction.

Appellee undertook to make no showing justifying the tardiness of its third party claim because of lack of notice,

etc. It was stipulated that appellee was financially sound, able to employ attorneys, procure bonds, or expend monies that may have been indicated or desirable for the recovery of the motor grader. [Tr. p. 61.]

Specifically it was the duty of appellee to mitigate its damages by availing itself of its statutory right to procure immediate possession of the property. This could have been accomplished by invoking any of the statutory provisions for the recovery of personal property such as replevin, claim and delivery, or proceedings under Section 689, Code of Civil Procedure, if the same are held applicable to this case. If it was necessary to give bond in said proceedings, it was appellee's duty to do so.(5)

IV.

Damages for Loss of Use May Not Be Awarded for a Period During Which Injunction Was in Effect.

On May 10, 1949, and as part of its order providing for the hearing of appellant's petition for determination of title, it was ordered that pending such determination that appellee be enjoined from transferring or removing the motor grader. The order did not require appellant to provide an undertaking on said injunction. [Tr. pp. 40-41.]

Appellee made no complaint of the court's omission to require of appellant an undertaking on the injunction. Knowing that it was the law, as the authorities hereinafter set forth establish, that in the absence of malice, ill-will and of probable cause, any recovery for an alleged

wrongful issuance of an injunction would be restricted to a suit against the surety under an injunction bond, the appellee should have petitioned the court for an order requiring such bond to be posted.

> "But it cannot be doubted that the court has power, where it appears that the injunction was issued on an insufficient undertaking, to order (as it did in the case in question) that the injunction should be dissolved unless a sufficient undertaking should be given, —or, in other words, should be continued in force only on condition that a sufficient undertaking should be given."
>
> *Lambert v. Haskell,* 80 Cal. 611, 616, 22 Pac. 327.

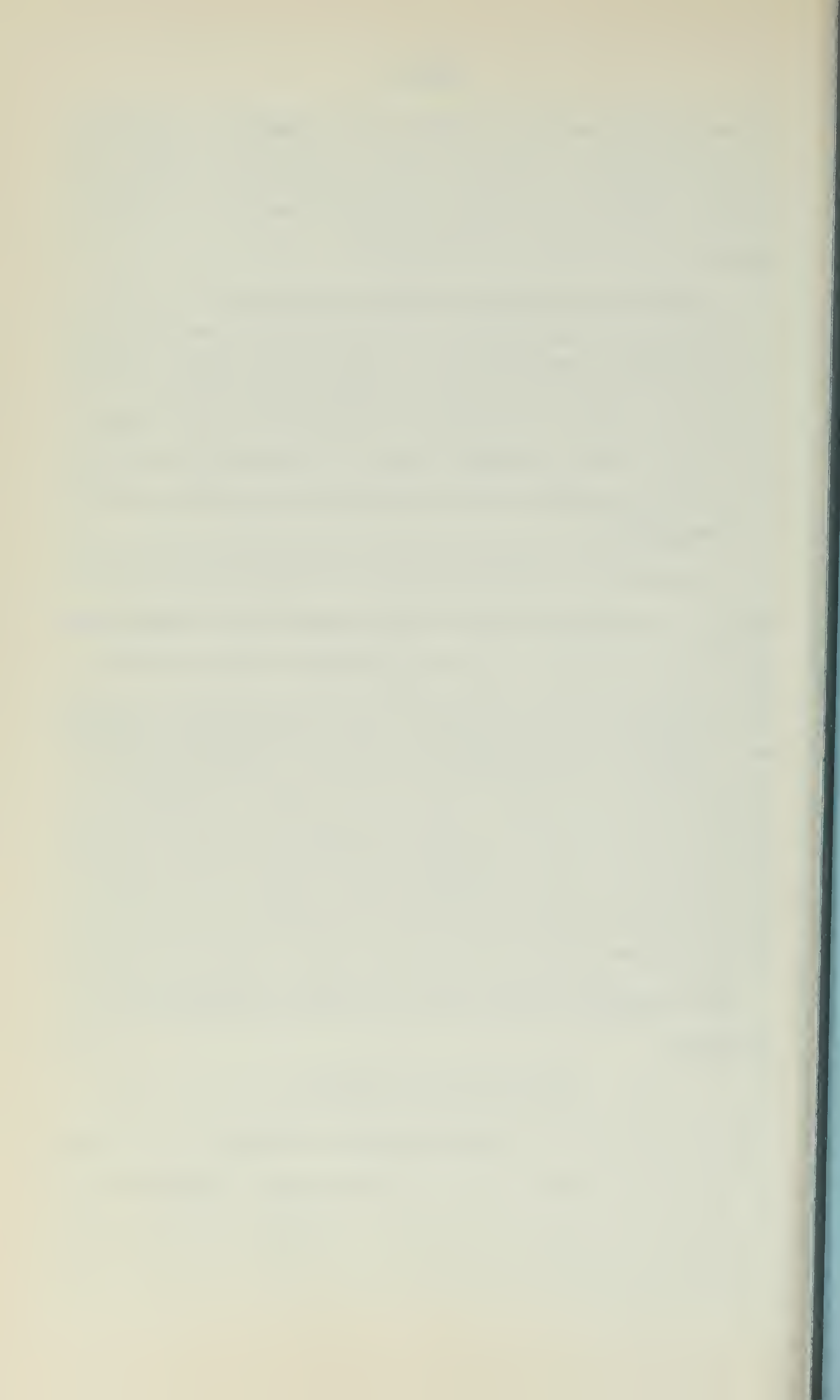
Unless it is charged that the issuance of an injunction represents an abuse of process through malice, and without probable cause, the only remedy of a party injured as a result of an injunction is upon the undertaking for the injunction. In the absence of such an undertaking no recovery may be had against the party procuring the injunction.(6) Accordingly, $1,114.90 of the judgment representing an award for loss of use of the motor grader for the period the injunction was in effect was erroneous.

The appellants respectfully pray that the judgment be reversed.

Respectfully submitted,

William K. Young,

Attorney for Appellants.



APPENDIX.

(1) The appellants' contention is that they should have had substantial compensatory damages and also punitive or exemplary damages. As to the compensatory damages, there was considerable confusion by all parties in the trial of the case as to what the proper measure of damages. It appears from the record in the case that there might have been two items which would have entered into the compensatory damages, that is to say, the deterioration of the cherries while in the possession of the sheriff under the writ and also the loss of the cherries by becoming overripe and dropping on the ground, if such was the fact.

In *Dorsey v. Manlove,* 14 Cal. 553, at 556, it is said:

"Where no question of fraud, malice or oppression, intervenes, the law limits the relief to compensation, as that term is legally understood; and in such cases the measure of relief is purely a matter of law. But where the trespass is committed from wanton or malicious motives, or a reckless disregard of the rights of others, or under circumstances of great hardship or oppression, the rule of compensation is not adhered to, and the measure and amount of damages are matters for the jury alone. In these cases the jury are not confined to the loss or injury sustained, but may go further and award punitive or exemplary damages, as a punishment for the act, or as a warning to others. We think these views are fully sustained by the authorities."

"As to the first item, that is, the depreciation of the value of the cherries, we are not prepared to say that the measure of damages which the court adopted was errone-

ous. The appellants set forth the general rule as follows: "The general rule is that where one recovers property which had been wrongfully taken from him, he is considered as having received it in mitigation of damages, and the measure of damages in the absence of special damage, is the expense of procuring its return with interest. But he may recover for any injury to the property during the period of wrongful detention. The provisions of section 3336 of the Civil Code fixing the measure of damages for the conversion of personal property apply only where the property is not returned or recovered and does not affect the rule here announced." (8 Cal. Jur. 781.)

"As in this case, where the cherries were returned, the damages would undoubtedly be the injury or loss suffered during the time between the levy and return, and the difference in the market value on those dates might be as proper a way to arrive at it as any other method, where there were no other special circumstances pleaded." "

> *Ross v. Sweeters,* 119 Cal. App. 716, 721, 722, 7 P. 2d 334.

(2) "The rule is that 'where one recovers his property again which had been unlawfully taken from him, he is considered as having received it in mitigation of damages'; and the measure of damages, in the absence of special damage, is the expense of procuring its return (with interest). (1 Sutherland on Damages, 239; and see 3 Sutherland on Damages, 527; and to same effect 1 Sedgwick on Damages, sec. 58.)"

> *Blewett v. Miller,* 131 Cal. 149, 151, 63 Pac. 157.

A similar rule relating to damages arising from wrongful garnishment:

"The contentions of counsel for Child seem to rest upon the theory that the garnishment was in substance an attachment wrongfully depriving him of the enjoyment of his property, the amount due from Sanger Lumber Company, pending the garnishment proceeding, and the controversy between him and lumber exchange as to which was entitled to be awarded the fund in question. This, we think, is a mistaken theory. The garnishment was not issued against Child, nor was any property taken from his possession under it, nor did it in the least interfere with his right to sue Watterman or Sanger Lumber Company for the amount due him. Instead of asserting his right to collect the indebtedness due him by an ordinary civil action, he voluntarily intervened in the garnishment proceeding seeking recovery of this fund in satisfaction of that indebtedness. In other words, he voluntarily became a plaintiff in intervention seeking relief, which, in substance, was the same ultimate relief he would have been seeking had he voluntarily become a plaintiff in an ordinary civil action seeking recovery of the indebtedness due him. We fail to see that Child is in any different position than he would have been in had he commenced and prosecuted to a successful termination such an ordinary civil action, insofar as his right to damages he here seeks is concerned. When the controversy was finally determined in his favor, he was awarded his costs. Plainly, he is not entitled to more for his trouble

incident to the prosecution of his claim, viewing his rights apart from any theory of malicious prosecution or want of probable cause on the part of lumber exchange in prosecuting the garnishment proceeding."

Child v. Western Lumber Exch., 233 Pac. 324 (Wash.).

(3) "Compensation is the cardinal purpose of the law of damages. Rockefeller v. Merritt, 76 Fed. 909, 917, 22 C. C. A. 608, 35 L. R. A. 633. With the exception of those rare cases in which punitive damages may be recovered, says Judge Sanborn, speaking for the Circuit Court of Appeals, Eighth Circuit, a defendant is never liable to pay more than the actual loss which he has inflicted upon the plaintiff by his wrong. Hoyt v. Fuller, 104 Fed. 192, 193, 43 C. C. A. 466. To give him damages where none have been caused is not to compensate him for a loss, but to punish the wrongdoer, and this is not permissible, except in the cases just mentioned.

"We think the better rule is followed in Frey v. Drahos, 7 Neb. 194, and Smith v. Stevens, 14 Colo. App. 491, 60 Pac. 580, where it was held in substance that plaintiff could not recover merely because he had a right to use, or was in a position to use, the property taken from him, but that it was incumbent upon him to go further, and show he needed the car, and was prevented from using it by the wrongful detention of it by the defendant. This is in harmony with the decision of the Supreme Court of the United States in The Conqueror, 166 U. S. 110, 133, 17 Sup. Ct. 510, 41 L. Ed. 937. * * *

"We gave expression to the same principle in Railroad Co. v. Car Co., 5 App. D. C. 524. In that case the plaintiff had entered into a contract with the defendant

to manufacture for it a number of street cars and deliver them within a certain time. It failed to make the delivery as prescribed. The defendant, when sued for a balance claimed to be due on the contract, contended it was entitled to recover by way of recoupment for loss of profits during the delay in the delivery. The court put aside the contention as unsound, and held that it was entitled to the reasonable hire or rent of the cars for the period of delay, provided they 'could and would have been in actual service' during that time.

"Following the rule laid down by these authorities, if there were days when the plaintiff did not have use for his car, they should be deducted from the whole period for which he is entitled to recover damages."

> *W. B. Moses & Sons v. Lockwood,* 295 Fed. Rep. 936, 940, 941.

(4) "It is a recognized rule of law that in a case where injury or damage to a plaintiff's property is threatened as the result of a tort or breach of contract by another, the duty rests upon the plaintiff to use reasonable care and diligence to protect his property against such threatened loss or injury, and if he fails to do so he will not be permitted to charge the defendant for that portion of his loss or injury which was due to plaintiff's own neglect in this behalf. This rule has been repeatedly recognized and applied in this state as well as elsewhere."

> *Vitagraph, Inc. v. Liberty Theatres Co.,* 197 Cal. 694, 697, 242 Pac. 709.

"The rule is well stated in 8 California Jurisprudence, 782, as follows: 'It is the duty of one who knows he is threatened with detriment, either in person, property or business, through another's breach of contract or tort,

to do all that he reasonably can to prevent or minimize the damage, and if he negligently fails to do this, he cannot recover for what he might have prevented.' "

Pretzer v. California Transit Co., 211 Cal. 202, 208, 209, 294 Pac. 382.

"It was the duty of the respondent to minimize his damage in every way. In *Baker v. Borello,* 136 Cal. 160 (68 Pac. 591), the court said: 'A party injured by the tort of another must not, by his negligence or wilfulness, allow the damage to be unnecessarily enhanced; and if he does so he cannot recover for the increased loss.' "

Withrow v. Becker, 6 Cal. App. (2d) 723, 730, 45 P. 2d 235.

"The rule is well settled that it is the duty of one who know he is threatened with damage to do all he reasonably can do to minimize his damage."

California Cotton etc. Assn. v. Byrne, 58 Cal. App. 2d 340, 345, 136 P. 2d 359.

(5) "(9, 10) Another principle which is applicable in this case: Where a person's right of property is invaded, it is his duty to do all reasonably within his power to reduce the damages. Damages which may be avoided by doing what an ordinarily prudent man would do are not the direct or natural consequence of the defendant's wrong, since it is plaintiff's option to suffer them. In such a situation the plaintiff is damaged, not by the defendant's act, but his own negligence or indifference to consequences. Chesapeake & Ohio Railway Co. v. Kelly, 241 U. S. 485, 489, 36 Sup. Ct. 630, 60 L. Ed. 1117, L. R. A. 1917F, 367, and cases there cited. The same effect are Sedgwick on Damages (9th Ed.), vol. 1, Secs. 201

and 202; Hoyt v. Fuller, *supra;* Woodward v. Pierce Co., 147 Ill. App. 339.

"(11) When the plaintiff's car was taken from him, he could have procured its return immediately by giving an undertaking under section 455 of the Code, with security approved by the court. It was his duty to do this, and thus to reduce the defendant's liability. If he had done it, the only loss which would have come to him would be that occasioned by the expense of procuring the undertaking and necessarily incurred for a car between the date of the levy and the return of his own car, assuming that he used due diligence throughout."

W. B. Moses & Sons v. Lockwood, 295 Fed. Rep. 936, 941.

"In determining the question of damages, the trier of the facts should consider the particular circumstances of the case, and, upon the facts, determining whether or not, at any stage of the proceedings, the Plaintiff should have mitigated his damages by availing himself of his statutory right to procure immediate possession of the property. In this connection, all relevant and material facts should be considered, including the expense connected with such a procedure, the financial ability of the Plaintiff to bear such expense, the relationship between such costs and the amount of damages claimed by the Plaintiff, the matter of whether or not any bond filed by Plaintiff would be met by a counter bond filed by the defendant, and an estimate of the probable time within which a judgment in the action, determining the title of the property, would be entered."

Hoff v. Lester, 168 P. 2d 409 (Wash.).

See:

Bradley v. Raymond, 209 P. 2d 305, 310.

(6) "An action on the case will not lie for improperly suing out an injunction, unless it is charged in the declaration as an abuse of the process of the Court through malice, and without probable cause. If the act complained of is destitute of these ingredients, then the only remedy of the injured party is an action upon the injunction bond, which is specially provided by the statute as a protection against injury, even without malice."

Robinson v. Kellum, 6 Cal. 399, 400.

"This is not an action brought upon an undertaking given upon the appointment of a receiver, required by section 566 of the Code of Civil Procedure, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of the receiver, in case the appointment has been procured wrongfully, maliciously or without sufficient cause. In bringing the action and procuring the appointment of a receiver, defendant Richardson was acting in his official capacity in the exercise of powers conferred upon him as Commissioner by the Building and Loan Association Act (Deering's Gen. Laws, 1931, P. 459, secs. 13.11 *et seq.*). No undertaking was given under section 566 nor was one required of the Commissioner, a state officer. (Sec. 1058, Code Civ. Proc.; *Mercantile Trust Co. v. Miller,* 166 Cal. 563 (137 Pac. 913).)

"(2) The liability of those who give the statutory indemnity bond, as principal or sureties, is created by contract and the action for damages is upon the contract. Here there was no undertaking and if any liability exists, its foundation is in tort as for malicious prosecution."

Jones v. Richardson, 9 Cal. App. 2d 657, 659, 660, 50 P. 2d 810.

(7) "And as the case stands the third party claimant is unaided by any such presumption; and the burden is where it was placed primarily by the pleadings upon the third party claimant, the plaintiff, to establish his title and right of possession by a fair preponderance of all the evidence thereon.

"In view of an apparent conflict of the authorities on this question, we will state that, from an examination of what we believe to be nearly all the authority available on this question, the conflict apparently arises, in the first instance, because of the difference in procedure, causing the third party to be regarded accordingly at times as an intervener, and as such an idditional party defendant, as to whom the plaintiff, the attaching creditor, still has the burden of proof, because of being plaintiff in the action. And then, again, under statutes requiring separate actions therefor to be brought after service of notice of third party claim, in which instances, the burden of proof, as in other cases, being upon the plaintiff under the pleadings, he (the third party) has to assume it throughout the trial. But in nearly all of the states, even where the third party intervenes in the original attachment action, such third party has such burden of proof, except where the property is found by the sheriff in the undisputed possession of the third party, the intervener; whereupon a presumption of ownership is in some jurisdictions held to arise from the fact of such possession.

"The court rightfully refused to give the instructions requested, and placed the burden of proof where it belonged. (Citations omitted.) 3 Elliott on Evidence, Nos. 1751, 1752, from which we quote: 'Where a third party interpleads or brings an independent action, claiming a superior right to the attached property, the burden in

most jurisdictions is upon such party to show his better claim.' And then again: 'Where a petition of intervention to an attachment is filed, and the petition is based upon the fact that the property belongs to the one intervening, and claims that the intervener acquired it by purchase prior to date of attachment, the burden is upon such intervener to show that he owned it before the filing of the attachment, and to prove by what manner he acquired title to it, or any other interest he may claim. * * * The burden of proof is usually upon the intervening claimant to prove that the property belongs to him, if in the hands of the attachment defendant; and this is true, even though the property is not actually in his possession, but only constructively so, or if in the hands of his agents, or of a carrier. The plaintiff has the burden of showing that at the time of seizure the sale was completed, and title had passed.' 47 Cen. Dig. col. 216, under title 'Burden of Proof.' "

Wipperman Mercantile Co. v. Robbins, 135 N. W. Rep. 785, 792.

No. 13669.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

W. W. SHEPHERD and NORMA D. SHEPHERD, co-partners, doing business as Shepherd Tractor & Equipment Co.,

Appellants,

vs.

CONSTRUCTORS, S. A., a corporation,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S BRIEF.

FILED

MAY 21 1953

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No. 13669.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

W. W. Shepherd and Norma D. Shepherd, co-partners, doing business as Shepherd Tractor & Equipment Co.,

Appellants,

vs.

Constructors, S. A., a corporation,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S BRIEF.

Statement of the Case.

Appellants' statement of facts is substantially correct except in the following respect:

That pursuant to appellants' instructions to the Sheriff of Los Angeles County to garnishee Julio A. Villaseñor's personal property in the possession of Belyea Truck Company, the said Sheriff did serve said writ of garnishment on the said Belyea Truck Company. [Tr. pp. 17; 12 and 13.]

ARGUMENT.

I.

Comment on Appellants' Argument.

Appellants contend that the trial Court erred in the following matters:

> "1. The adjudication by the State court of appellee's right of possession to and ownership of motor grader was void for lack of jurisdiction." (App. Op. Br. pp. 3 and 4.)

(a) Contrary to appellants' argument Exhibit 1 was received into evidence as *appellee's* Exhibit 1, and appellants' objection to its introduction on the ground that it appeared on the face of the pleading that the court had no jurisdiction is both contrary to the facts and to the law in this case. [Tr. pp. 36 and 37.]

(b) In essence appellants' contention of lack of jurisdiction by the State Court to try the Third Party Claim is based on the fact that the Sheriff did not have physical possession, or received manual delivery of the said motor grader, and hence appellants contend that there was no valid levy of the writ of garnishment. Appellants cite the case of *Bank of America v. Riggs,* 39 Cal. App. 2d 679, in support of their contention. That case does not apply to the facts of the case at bar; since the property garnished in the cited case consisted of corporate securities, stocks or credits. Furthermore in the cited case, at page 683 the court quotes the case of *First National Bank v. Kinslow,* 8 Cal. 2d 339, 67 P. 2d 796, as follows: "The right to the possession of the property levied at the time of the levy is therefore the only question put in issue by the filing of

the Third Party Claim"; and therefore appellants' contention that the State Court had no jurisdiction to try the issue of title and possession due to an invalid levy, is contrary to the rule expressed in this case and has no merit.

(c) The case of *First National Bank v. Kinslow, supra,* cited by appellants, concerns the liability of the levying officer in levying a writ of execution. This cited case goes to the liability and duties of the levying officer and does not touch on the question of the liability of the party causing an attachment or garnishment upon an innocent third party.

The cited case applies only to an execution on real property and not on personal property as in the case at bar.

(d) In *Thompson v. Cook,* 20 Cal. 2d 564, cited by appellants, the question presented there was the right of defendant to set aside a default judgment which had been rendered without notice to the defendant. It will be noted that in the case at issue there was no default, all parties were present in court to present any objection to the State Court's jurisdiction in determining title and possession of the motor grader. [Tr. pp. 27 and 28.] Further, it will be noted that the Third Party action was set for trial and hearing at the express request of the appellants herein. [See App. Op. Br., pp. 2 and 3; Clk. Tr. p. 18.] Therefore, the appellants invoked the jurisdiction of the State Court to try the issue of the Third Party Claim, to determine title and right of possession of the motor grader in question. The appellants should now be estopped from raising the question of lack of jurisdiction of the State Court. One who has invoked exercise of jurisdiction within general powers of court cannot seek to reverse its orders upon ground of lack of jurisdiction. (*Cal. Code*

Civ. Proc., Sec. 1962, Sub. 3; Sec. 1963, Sub. 16; *Hensgen v. Silberman,* 87 Cal. App. 2d 668, at 673.) The Court, in discussing the Doctrine of Estoppel as applicable to the question of jurisdiction, stated as follows:

> "The California doctrine is based upon subdivision 3 of 1962 of the Code of Civil Procedure, which prohibits a party from denying an act which he has deliberately led another to believe and act upon as true. Though ignorance of the truth is a primary essential on the part of one pleading an estoppel *in pais,* our courts have recognized another species of estoppel, called 'quasi estoppel' which is based upon the principle that one cannot blow both hot and cold, or that one 'with full knowlege of the facts shall not be permitted to act in a manner inconsistent with his former position or conduct to the injury of another' . . ."

Plaintiff, after replying to answer and submitting to trial on the merits, could not question the court's jurisdictio to entertain counterclaims. (*Cooling Tower Co. v. V. V. Braun & Co.,* 1 F. 2d 178.)

A Superior Court of general jurisdiction, acting within the general scope of its power, is presumed to act rightly, and this presumption embraces jurisdiction, not only of the cause or subject matter of the action in which the judgment is given, but of the parties also. (*Cabin v. Page,* 85 U. S. 350.)

The rule is that the Superior Court, as a court of record and general jurisdiction is presumed to have jurisdiction over a particular cause. It is not necessary to plead affirmatively the facts showing jurisdiction, and lack

of jurisdiction must be affirmatively shown. (*Cal. Code Civ. Proc.*, Sec. 1963, Sub. 16; *Cheney v. Trauzettel*, 9 Cal. 2d 158. 160.)

Appellants did not raise the question of lack of jurisdiction in their pleadings or at the time of trial in the State Court. Appellants did not make any motion to set aside the judgment of the State Court as provided for in Code of Civil Procedure Section 473. And lastly, appellants did not avail themselves of the right of appeal from said judgment. Appellants should be estopped from raising the question of lack of jurisdiction of the State Court at this time and in this Court.

In view of the above, it is the position of the appellee that all matters pertaining to the trial and judgment of the Third Party Claim must be considered *res adjudicata*.

II.

The second of appellant's Specification of Errors is that:

> 2. "The trial court erred in denying appellant's motion for a judgment of nonsuit." (App. Op. Br. pp. 3-7.)

(a) Since the judgment of the State Court declared that the appellee was the owner of and entitled to possession of the said motor grader, the Court properly denied appellants' motion for nonsuit, as title and right to possession was *res adjudicata*, as aforesaid. The appellee's introduction to evidence of the judgment and the file of the case in

the State Court was sufficient to establish the appellee's *prima facie* case. [Tr. pp. 36-37.]

(b) Appellants contend that appellee failed to allege ownership and right of possession to the motor grader in appellee's complaint filed in the United States District Court. Paragraph VII of appellee's complaint adequately alleges those facts. [Tr. p. 5.] Furthermore, appellants should not be allowed to attack the sufficiency of the appellee's complaint at this stage of the case, since the appellants did not see fit to object to the same either before or during trial.

III.

Appellants contend in their Third Specification of Errors:

> 3. "Damages awarded were erroneously allowed and were also excessive.
>
> "(a) Measure of damages for wrongful garnishment is limited to expense of recovering motor grader." (App. Op. Br. pp. 3 and 7.)

(a) Appellants contend that the damages awarded by the United States District Court should have been limited to the expense of the return of the motor grader with interest; the recovery of the chattel being received in mitigation of damages. It is evident that the appellants, throughout all of these proceedings, insist on labeling this action as one for damages for wrongful levy of process. However, it has been appellee's position from the filing of the complaint in the United States District Court [Tr. p. 3], and throughout the proceedings of this case, and

from the evidence on which the Court based its Findings of Fact and Conclusions of Law and Judgment [Tr. pp. 24-34, incl.] that the cause of action for which the appellee seeks redress from appellants is one of TRESPASS. This matter will be forcefully discussed by appellee in its own argument. Therefore any limitation of damages as sought herein by appellants erroneously based on the theory of wrongful levy of process is not in point, as the action at bar is that of trespass, *i.e.,* the unauthorized interference with appellee's title and right to possession of the said motor grader.

The authorities cited by appellants, *i.e., Dorsey v. Marlow,* 14 Cal. 553 at 556; *Ross v. Sweeters,* 119 Cal. App. 716; *Blewett v. Miller,* 131 Cal. 149, are concerned with damages to personal property, either for conversion where there was a total loss, or for depreciation of, or damage to the chattel itself; *i.e.,* horses were lost, cows lost weight, cherries became overripe, etc., but not for loss of use as in our case. The appellee has no quarrel with the principles of law enunciated by those cases, but since appellee's claim for damages is not based on that type of damage, those cases do not apply. Rather, the following authorities which are concerned with damages for loss of use are applicable.

In the case of *Meyers v. Bradford,* 54 Cal. App. 157 at 160, the Court states:

> "The only difficulty is in determining the financial measure of the use of the machine; in other words, how much money would compensate for the loss of its

use during the time it was being repaired. If the plaintiff had hired another machine, what he paid for it, if the rental value, would furnish a practicable and reasonable measure of his loss. But he suffers an equal detriment if he chooses to do without a machine while his is being repaired, and there seems to be no sound reason why the rental value of such machine should not be taken in either case as a fair measure of his loss."

(b) The appellants contend that since appellee did not establish by the evidence that the motor grader could have been used in the county of Los Angeles during the period of detention, the appellee is not entitled to recover damages for loss of use of the motor grader. This is not supported by the authorities in this jurisdiction as is shown in the case of *Meyers v. Bradford, supra.*

(c) Appellant's claim that appellee did not act with diligence to protect its own interest in seeking the recovery of its motor grader at the earliest possible time. This is not supported by the evidence and the findings of the trial court. The appellee did not have possession or control of the motor grader after the attachment and subsequent restraining order; and as such, was not in a position to mitigate the damages. The authorities support this statement, in that they require that the injured party does some act which approximately contributes to the damage. The case of *Valencia v. Shell Oil Co.,* 23 Cal. 2d 840 at 846, 847, holds that:

"The essence of the rule denying recovery for losses which could have been prevented by the reasonable

> efforts and expenditures of plaintiff is that his conduct rather than that of defendant approximately caused said losses."

Once the wrongful act of trespass was committed by the appellants the act causing the damages was complete; and appellants must be held responsible for all the damages flowing from that wrongful act. The fact that the legal process, *i.e.,* Third Party Claim, required a definite length of time to resolve the question of title and possession, was solely due to the court procedure set in motion by the appellants' wrongful act of trespass. In no way was this damage contributed to by any acts of the appellee. This was found to be so by the United States District Court and its finding on this matter should not be disturbed, unless appellants can show a clear abuse of discretion on the part of said Court.

IV.

(a) Appellants contend that appellee is not entitled to damages for loss of the use of the motor grader from the time the restraining order was granted, to-wit, May 10, 1949, because the appellee did not ask the State Court to require an undertaking on the part of the appellants in support of the injunction order.

It is again necessary to reiterate that the appellee's action in the District Court of the United States is one for damages arising out of trespass. In trespass the elements of malice, ill will, and probable cause are immaterial and not in point. The issue is solely that of unjustified inter-

ference with the right of possession. The authorities are clear in their distinction between an action founded on trespass and that for damages for the wrongful use of process. In the case of *McPheeters v. Bateman,* 11 Cal. App. 2d 106, the defendant levied upon property which did not belong to the judgment debtor. At page 109 of said case the Court held as follows:

> "Where an execution is levied upon property which does not belong to the judgment debtor the owner of the property is entitled to recover from those responsible for the levy, such as damage as he may have suffered by reason of the levy, and any further proceedings taken thereunder. He sues for trespass to the property and not for malicious prosecution, unless he also seeks to charge the wrongdoer with exemplary damages."

The appellants by obtaining the restraining order committed an act of trespass in wrongfully interfering with the lawful possession of the motor grader. In fact, therefore, from February 25, 1949, to May 10, 1949, the appellants deprived appellee of the rightful possession of the motor grader by means of the writ of attachment; and from May 10, 1949, until judgment was had in the Third Party Claim, the appellants deprived appellee of its right to possession to said chattel by means of the restraining order sought for and obtained by appellants. Again, appellee wishes to make clear its position, that also in the matter of the restraining order the appellee was still not a party to the suit, between appellant and debtor. The rule requiring an undertaking might apply to the debtor

in the first instance, *i.e.,* in the State Court action between the appellants and Julio A. Villaseñor, but could not apply to an innocent third party, appellee, who was damaged by appellants' act of trespass, *i.e.,* the restraining order obtained by the appellants herein.

In any event it would seem to appellee that the reason the law gives the right to a restrained party to require an undertaking is to afford the party restrained the protection in dealing with a financially responsible party who is able to respond in damages. The appellee fails to find authority to support appellants' contention that makes it a prerequisite to liability that an undertaking be requested by the restrained party, when that party is an innocent third party and is not involved in any way in the litigation between the debtor and the creditor in the main action, *i.e.,* the case of appellants against Villaseñor.

The appellants cite the case of *Lembert v. Haskell,* 80 Cal. 611, 616, 22 Pac. 327, as authority for appellants' contention that appellee was duty bound to ask for an undertaking before appellants can be held responsible for the damage arising out of and caused by the restraining order. That case does not support appellants' contention, for it seems to be concerned with the *court's power* to require a sufficient undertaking upon motion by the party restrained. In no way can appellee find in this case any support for appellants' contention that an undertaking is a necessary prerequisite before the injured party can sue in damages arising out of the unauthorized interference with the possession of the chattel.

APPELLEE'S ARGUMENT.

I.

Liability.

The appellee's action in the United States District Court is based on the cause of action of trespass to personal property. An interference with the possession or physical condition of the personal property in the possession of another, without justification, is a trespass.

In the case of *McPheeters v. Bateman,* 11 Cal. App. 2d 106, cited *supra,* the defendant levied upon property which did not belong to the judgment debtor. The plaintiff, the owner of the restaurant business which was levied upon by defendant, now sues for trespass to the property and for damages resulting therefrom. This case clearly holds that the defendant is liable for damages if he interferes with the possession of plaintiff's personal property by a writ of execution, and by anology it should apply to the garnishment and restraining order in the instant case. The action is the old common law action of trespass. The question of malice or of probable cause is not involved in an action of trespass; as the case of *McPheeters v. Bateman, supra,* also hold that where the evidence showed that the instructions to the constable were sufficient to authorize him to take possession of all the personal property belonging to the restaurant business of plaintiff, the damages sustained by reason of loss of such property were reasonable, as were plaintiff's loss of profits while the business was closed, even though the levy was made upon sufficient cause and without malice.

The case of *Rider v. Edgar,* 54 Cal. 127, holds that to maintain trover or trespass *de bonis asportatis,* evidence of an actual forcible dispossession of the plaintiff is not

necessary. Any unlawful interference with the property, or exercise of dominion over it, by which the owner is damnified, is sufficient to maintain either action. It was held that in an action by a mortgagee of personal property against a sheriff, for taking the same under attachment, that a levy upon a part of the property in the possession of the mortgagor, and the appointment of a keeper, was a taking, although the property was not moved or otherwise disturbed, and though it was released before any demand from plaintiff therein.

II.
Damages.

As a guide to the Court in assessing damages the appellee submits the following cases which indicate the trend of the Court's views on wrongful detention of machinery or equipment.

Ferris v. Cooper, 125 Cal. App. 234, awarding two-thirds of the value of the machinery detained as not being excessive.

Dunlop v. Farmer, 64 Cal. App. 691, awarding one-half of the value of the automobile detained as not being excessive.

Restatement of Torts, Section 931, Subsection (a), in substance holds that the compensable damages to the owner of a chattel is the value of the use of the chattel or rental value of a substitute.

> *Cal. Civ. Code,* Sec. 3333;
>
> *Zvolanek v. Bodger Seeds, Ltd.,* 5 Cal. App. 2d 106 at 108.

"Damages are either general or special. Damages which necessarily result from the act complained of are denominated general damages, and may be proved under the *ad damnum* clause or general allegation of damage; while those which are the natural consequence of the act complained of, and not the necessary result of it, are termed special damages. Special damages must be specially set forth in the complaint or the plaintiff will not be permitted to give evidence of it at the trial . . . The measure of damages arising from tort, such as the one herein pleaded, is the amount which will compensate for all detriment proximately caused thereby whether it could be anticipated or not." (Civ. Code, Sec. 3333.)

California Code of Civil Procedure, Section 667, provides for damages to be awarded for detention of chattel.

Respectfully submitted,

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JOSEPH GALEA,

By ANTHONY M. NEWMAN,

Attorneys for Appellee.

No. 13669.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

W. W. SHEPHERD and NORMA D. SHEPHERD, Co-partners, Doing Business as Shepherd Tractor & Equipment Co.,

Appellants,

vs.

CONSTRUCTORA, S. A., a Corporation,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANTS' REPLY BRIEF.

FILED

AUG 14 1953

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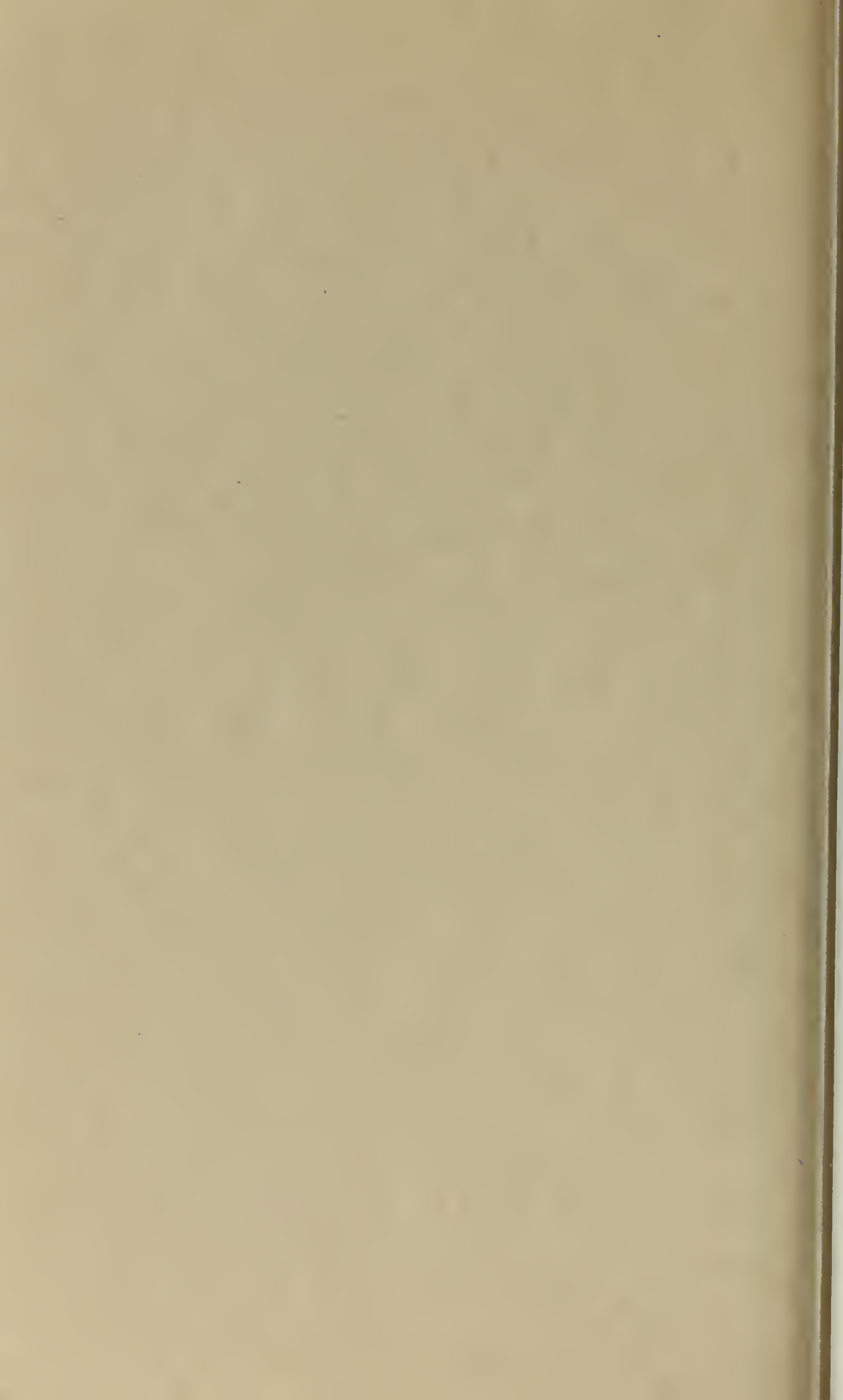

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No. 13669.

IN THE

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W. W. Shepherd and Norma D. Shepherd, Co-partners, Doing Business as Shepherd Tractor & Equipment Co.,

Appellants,

vs.

Constructora, S. A., a Corporation,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANTS' REPLY BRIEF.

Comment.

It is correct for appellee to say that it offered into evidence Exhibit 1, the same consisting of the file of the Third party claim suit in the State Court. Appellant objected to its admission on the ground that

> "it appears on the face of the pleadings contained in the claim that the court had no jurisdiction" [Tr. pp. 36-37.]

The Judgment of the State Court Was Open to Attack.

Appellee questions, because a default of judgment was involved in the case of *Thompson v. Cook,* 20 Cal. 2d 564, cited by appellant, as authority for the rule that when parties admit what the facts that establish lack of jurisdiction of a court rendering a judgment, that the same is void as if shown by the record.

We refer the court to similar holdings in other cases, a default judgment not being involved.

> "We dismiss appellant's objection, that respondent may not attack a judgment, regular on its face, by citing the former decisions of this court to the effect that the rule is not that a judgment which is void will be enforced as if it were valid, but that it cannot be shown to be void except in certain ways. But if the parties admit the facts which show that the judgment is void, or if they are established without opposition, then, as a question of law upon such facts, we do not see why the case is not like that where the judgment is void upon its face."
>
> *Akley v. Bassett,* 189 Cal. 625, 639.

> "When the attack which the defendant makes upon said decree is not only not resisted as collateral but when the facts upon which it relies to establish that the decree is void are expressly admitted by the party relying upon such decree and also expressly permitted to be introduced in evidence without objection, his present objection that the attack is collateral must be held to have been waived, and if, as a matter of law, the decree upon the admitted facts is void, it is the duty of the court to so declare."
>
> *Follette v. Pacific Light and Power Corporation,* 189 Cal. 193, 205.

"These cases establish the rule that, although a judgment cannot be collaterally attacked because of lack of service, if that fact is stipulated to, the judgment must be read as if that fact appeared on the face of the judgment. In such event the judgment is then void on its face."

Estate of John Ivory, 37 Cal. App. 2d 22, 31.

"However, a judgment void for lack of jurisdiction of the subject matter is equally subject to collateral attack when that fact appears on the face of the judgment roll. (Capital Bond & Investment Co. v. Hood, 218 Cal. 729 [24 P. (2d) 765], and equally subject to the rule as quoted in Thompson v. Cook, *supra,* from Hill v. City Cab, etc. Co., 79 Cal. 188, 191 [21 Pac. 728]):

"If the party, however, should admit the facts which show the judgment to be void . . . then, as a question of law upon such facts, we do not see why the case is not like that where a judgment is void upon its face."

San Francisco Unified School District v. City and County of San Francisco, 54 Cal. App. 2d 105, 111-112.

Pleadings. Appellee argues that appellant has not pled in its answer as a defense that the state court judgment was void for lack of jurisdiction. This need not be determined as appellee stipulated that included in the issues herein was whether the state court had jurisdiction to determine the Third party claim. [Tr. pp. 21-22.]

Estoppel. The Third party claim proceeding was inaugurated not by appellant, but by appellee when it filed with the sheriff its third party claim. As there were no

fruits under the state court judgment, appellant is not estopped to attack the judgment on the theory that it accepted the fruits thereof.

Pleadings, Appellee's Lack Thereof, Respecting Ownership of Motorgrader.

Appellant does not attack the sufficiency of the pleadings of appellee. It has merely pointed out that the only allegations in the complaint of appellee, respecting ownership of the motorgrader, are based on its allegations respecting the judgment of the state court declaring appellee to be sole owner. Had appellee set forth in his complaint an unqualified allegation respecting its alleged title and ownership of the motorgrader, it would have been entitled to offer evidence in support thereof, independently of the judgment of the state court which appellant attacked at the trial and on this appeal.

Damages.

It is submitted that the rule of damages for loss of use of an automobile, as contended for by appellee, is not applicable to the instant case. We are here dealing with a motorgrader, which is a specialized type of earth moving equipment. It may not be said that the demand for the rental of such equipment is comparable to the demand for an automobile. In the absence of evidence establishing such a demand for a motorgrader, it would be improper for the court to indulge in the conclusion that a motorgrader is capable of being put to use on a basis comparable to that of an automobile, hence, the point of appellant presented in its opening brief is well taken that damages for loss of use are not recoverable in the absence of showing that the motorgrader would have been in use during the period of deprivation.

State Court's Lack of Jurisdiction to Try Title to Motorgrader.

Since the filing of appellant's opening brief herein, there has been lodged with the court a supplemental Transcript of Record, the same consisting of the opinion of the trial judge herein.

The interpretation placed on Section 689, Code of Civil Procedure, by the reviewing courts of California indicate that the remedial provisions thereof are available only in instances where the type of levying by the sheriff is such that the property comes in his possession and custody. The following cases illustrate the foregoing.

> "The effect of the appeal is to leave this question of title suspended and in the same condition as it was in before trial. The sheriff accordingly holds the property which he seized under a writ of execution subject to the third party claim. If he sells the property before title is finally determined he sells at his own risk. Section 689 gives the judgment creditor the privilege of relieving the sheriff of that risk by posting a bond to indemnify him, and the section makes it plain that it is only when such undertaking is given that the sheriff is required to hold the property."
>
> *Fulton v. Webb,* 9 Cal. 2d 726, 729.

> "Third party claim proceedings under Section 689 of the Code of Civil Procedure are had for the purpose of determining whether the debtor has any right, title or interest in the property upon which the levy has been made. By the terms of that section, the judgment of the court in such proceedings is only made 'conclusive as to the right of the plaintiff, or other person in whose favor the writ runs, to have

said property taken, or held, by the officer and to subject said property to payment or other satisfaction of his judgment.' "

Deevy v. Lewis, 54 Cal. App. 2d 24, 29.

The cases cited by appellant in support of its argument that Section 689, Code of Civil Procedure, may not be invoked where the levy was by way of garnishment are criticized because only debts or corporate stock were the subject of said decisions, excepting the Kinslow case.

The primary and present purpose of Section 689, Code of Civil Procedure, is to give protection to the sheriff levying a writ of attachment against claims for damages by third persons. It is clearly held in the citation submitted by appellant in the case of *Bank of America v. Riggs,* 39 Cal. App. 2d 679, 683, that damages against a sheriff could not accrue unless the movables levied on him were in his physical custody by seizure and detention. We submit that such ruling remains unimpaired notwithstanding the amendment of the statute.

In the Kinslow case the court discussed the provisions of Section 689, Code of Civil Procedure, and held that where personal property is levied upon by the sheriff, the right accrues to a third person claiming such property to assert his claim and, omitting so to do, according to the terms of the section, the officer making the levy is not liable to him in damages. The court expressly approves the decision in the case of *Sunset Realty Co. v. Dadmun,* 34 Cal. App. 2d (Supp.) 733, 88 Pac. 2d 943.

In the latter case the court said:

"In the Kinslow case, the expressions 'taking or keeping such property' and 'holding . . . such property' were said to be 'not pertinent to any acts of an officer levying execution upon real property. He neither takes, keeps nor holds real property after a levy thereon.' We now have not only these, but other expressions: 'seizing, taking, withholding or sale of such property'; 'the taking, keeping or sale of such property'; 'such officer shall hold the property'; 'right to have said property taken, or held, by the officer.' In this connection, we quote from *Herrlich v Kaufmann, supra,* 99 Cal. 271, 274; because of the words we emphasize: 'Formerly, assets of a judgment debtor, *which could not be effectively seized by the sheriff under an execution, such as a debt* owing to the defendant, could be reached, upon a proper showing, through a court of equity by means of a creditors' bill or suit,' and adopting the thought of the Supreme Court in the *Kinslow* case, we say: the expressions we have just quoted from Section 689 are not pertinent to any acts of an officer garnisheeing a debt. He neither seizes, takes, holds, withholds, keeps or sells the debt. Nowhere in Section 689, Code of Civil Procedure, do we find any language indicating that it had any reason to be or was intended to be applied when a debt had been subjected to garnishment."

Sunset Realty Co. v. Dadmun, 34 Cal. pp. 2d (Supp.) 733, 741-742.

We submit that the reasoning of the opinion in the last quoted case is equally applicable whether the subject of the garnishment was a debt or other type of personal property in the hands of a third person.

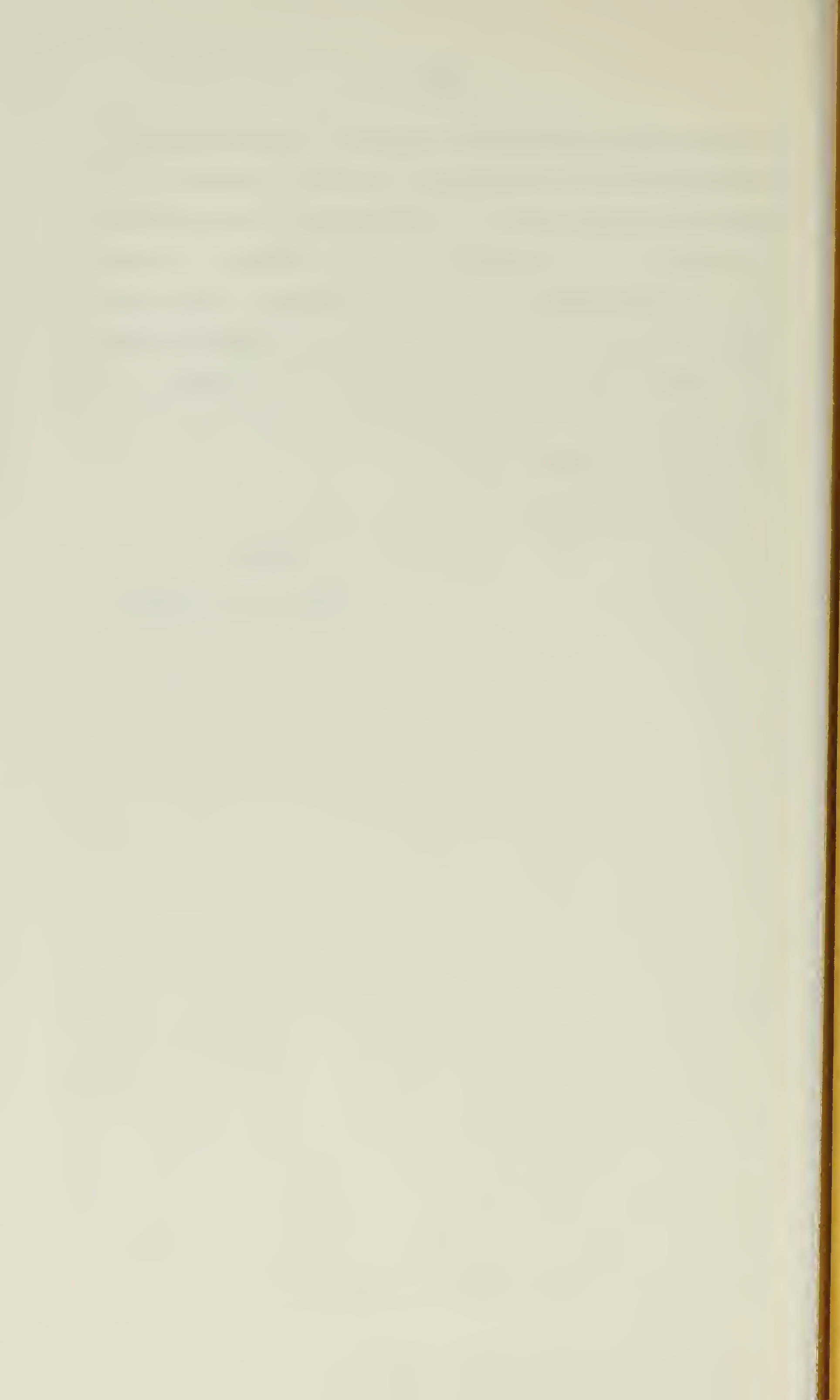
All doubt from the controversy would be removed if it was determined that Belyea was the agent of defendant, as subsection 3 of Section 542, Code of Civil Procedure, would apply, as the same provides that personal property capable of manual delivery, in the possession of the defendant, must be attached by taking the same into custody. Assuming that Belyea was the agent or bailee of appellee, we submit that there is no justification for the trial court's conclusion that, "Obviously, Belyea would not therefore turn the grader over to Constructora." [Supp. Tr. p. 77.] Conceivably, an arrangement might have been made with Belyea by appellee whereby in consideration of an indemnity agreement the motorgrader could have been put in active use in Los Angeles County, thus minimizing damages, or even permitting the removal thereof to Mexico. On the question of minimizing damages, the omission of Belyea to file its answer to the garnishment prior to August 4, 1949, or to notify appellee more promptly of the levy of the garnishment should not be charged to appellant. After all, no notice was acquired by appellant, respecting the appellee's interest in the motorgrader, until the filing of the third party claim on May 9, 1949. Appellant should not suffer because of the derelictions of appellee or its agent. Sec. 3543, Civil Code of California. Within twenty-four (24) hours after re-

ceiving notice of appellee's asserted interest it notified the sheriff that no indemnity bond was to be posted. Had application been made by appellee the restraining order might have been modified to require a bond if the showing so justified same. But appellee made no such motion or took any other steps to mitigate its claimed damage. We submit that these facts warrant consideration by this Honorable Court in passing on that phase of the case relating to damages.

Appellant submits that the judgment should be reversed.

William K. Young,

Attorney for Appellant.



No. 13,669

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

W. W. Shepherd and Norma D. Shepherd, Co-Partners, Doing Business as Shepherd Tractor & Equipment Co.,

Appellants,

vs.

Constructora, S.A., a Corporation,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S PETITION FOR REHEARING.

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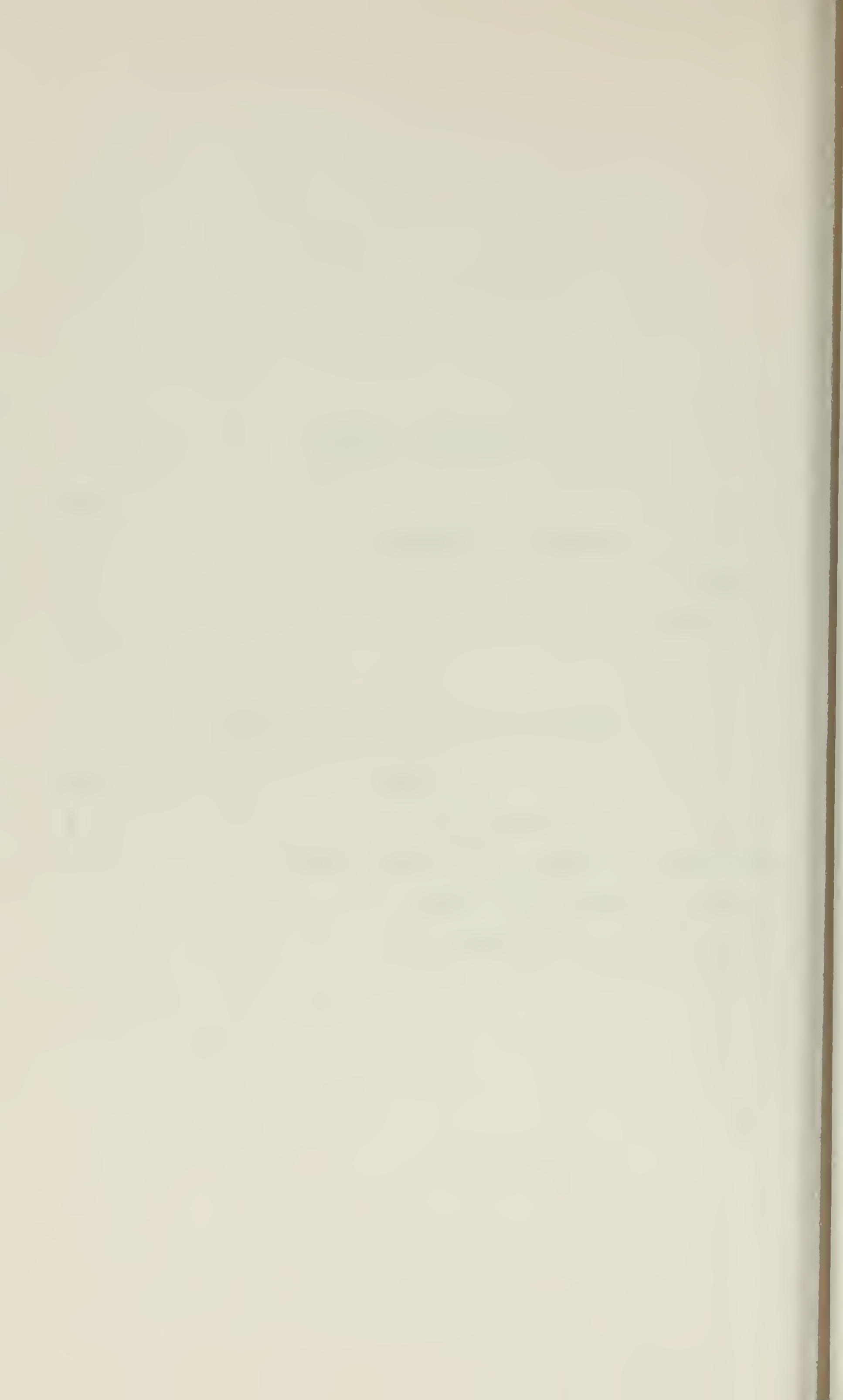

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Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S PETITION FOR REHEARING.

Constructora, S.A., a corporation, Appellee, hereby respectfully petitions this Court for rehearing in this cause and for the withdrawal of this Court's opinion and decision dated June 28, 1954.

Statement of Grounds for Rehearing.

That the opinion of this Honorable Court, reversing the judgment of the United States District Court was in error in the following:

1. This Court erred in ignoring the leading California case of *McPheeters v. Bateman*, 11 Cal. App. 2d 106,

which is the applicable law to the facts of the case at issue cited in Appellee's Appeal Brief.

2. This Court erred in relying upon the cases of *Robinson v. Kellum,* 6 Cal. 399, and *Vesper v. Crane Co.,* 165 Cal. 36, since the facts and the law of these cases are not applicable to the case at issue.

3. This Court erred in holding that Appellee could not recover damages in the United States District Court because Appellee did not prove malice, ill will or lack of probable cause on the part of Appellants.

Argument.

1. The Court misconstrued the facts at issue. Constructora, S.A., was an innocent third party whose motor grader was attached by Appellants when Appellants were seeking property belonging to VillaSenor, the Defendant, who was being sued by Appellants in the Superior Court action. Appellee was a stranger to the litigation between Appellants and the mentioned VillaSenor. Therefore, when Appellants attached Appellee's property the Appellants committed an act of trespass to Appellee's personal property. The leading case of *McPheeters v. Bateman,* 11 Cal. App. 2d 106, is applicable.

Judge Shinn in the case of *McPheeters v. Bateman, supra,* at page 107, states:

> "This is an appeal by defendant Alynette Bateman from a judgment for damages caused by the levy of an execution upon the property of plaintiff herein, who was not the judgment *debtor.* . . ." (Emphasis ours.)

At page 109 Judge Shinn points out that:

> "Where an execution is levied upon property which does not belong to the judgment debtor, the owner of the property is entitled to recover from those responsible for the levy of such damage as he may have suffered by reason of the levy, and any further proceedings taken thereunder. *He sues for trespass to the property and not for malicious prosecution*, unless he also seeks to charge the wrongful doer with exemplary damages." (Emphasis ours.)

At page 109 Judge Shinn after discussing the damages awarded states:

> "These damages were reasonable *even though the levy was made upon sufficient cause and without malice,* and this part of the judgment should be affirmed." (Emphasis ours.)

This theory of law was thoroughly discussed by the Trial Judge of the United States District Court as shown in the Reporter's Transcript of Proceedings which is before this Court, commencing at page 19 and ending at page 24. There the Court also cited the case of *Breard v. Lee,* 192 Fed. Rep. 72. In that case in applying California law the Court stated at page 73:

> "Wherein, under well established principles, these facts are lacking in the essentials of a cause of action for a tortious taking and conversion of property, is not readily to be perceived. Certainly no question is better settled by the course of decision generally under our system than that one who takes the property of another without right, whether under color or official authority or otherwise, is guilty of a wrongful and tortious act, and that an action in the nature of either trespass, trover, or replevin will lie for its correction. This is true as well where

which is the applicable law to the facts of the case at issue cited in Appellee's Appeal Brief.

2. This Court erred in relying upon the cases of *Robinson v. Kellum,* 6 Cal. 399, and *Vesper v. Crane Co.,* 165 Cal. 36, since the facts and the law of these cases are not applicable to the case at issue.

3. This Court erred in holding that Appellee could not recover damages in the United States District Court because Appellee did not prove malice, ill will or lack of probable cause on the part of Appellants.

Argument.

1. The Court misconstrued the facts at issue. Constructora, S.A., was an innocent third party whose motor grader was attached by Appellants when Appellants were seeking property belonging to VillaSenor, the Defendant, who was being sued by Appellants in the Superior Court action. Appellee was a stranger to the litigation between Appellants and the mentioned VillaSenor. Therefore, when Appellants attached Appellee's property the Appellants committed an act of trespass to Appellee's personal property. The leading case of *McPheeters v. Bateman,* 11 Cal. App. 2d 106, is applicable.

Judge Shinn in the case of *McPheeters v. Bateman, supra,* at page 107, states:

> "This is an appeal by defendant Alynette Bateman from a judgment for damages caused by the levy of an execution upon the property of plaintiff herein, who was not the judgment *debtor*. . . ." (Emphasis ours.)

At page 109 Judge Shinn points out that:

"Where an execution is levied upon property which does not belong to the judgment debtor, the owner of the property is entitled to recover from those responsible for the levy of such damage as he may have suffered by reason of the levy, and any further proceedings taken thereunder. *He sues for trespass to the property and not for malicious prosecution*, unless he also seeks to charge the wrongful doer with exemplary damages." (Emphasis ours.)

At page 109 Judge Shinn after discussing the damages awarded states:

"These damages were reasonable *even though the levy was made upon sufficient cause and without malice,* and this part of the judgment should be affirmed." (Emphasis ours.)

This theory of law was thoroughly discussed by the Trial Judge of the United States District Court as shown in the Reporter's Transcript of Proceedings which is before this Court, commencing at page 19 and ending at page 24. There the Court also cited the case of *Breard v. Lee,* 192 Fed. Rep. 72. In that case in applying California law the Court stated at page 73:

"Wherein, under well established principles, these facts are lacking in the essentials of a cause of action for a tortious taking and conversion of property, is not readily to be perceived. Certainly no question is better settled by the course of decision generally under our system than that one who takes the property of another without right, whether under color or official authority or otherwise, is guilty of a wrongful and tortious act, and that an action in the nature of either trespass, trover, or replevin will lie for its correction. This is true as well where

> the property is taken under a supposed claim of right as where the taking is with knowledge of the wrong, since in either case the trespasser acts at his peril. And one who directs the taking by an officer executing a writ of property not rightfully subject thereto is equally guilty of the wrong committed as the officer who executes the writ. In such an instance both the officer and the one who directs the taking are joint tort feasors, and either one or both may be held responsible by the owner at his election. These principles are so fully established as to require no elaborate citation of authorities in their support."

In view of the above it is readily apparent that the case before the Court is an action for damages for trespass and not for wrongful attachment or malicious prosecution. Therefore the elements of malice, ill will or lack of probable cause do not apply.

2. The Court erred in relying on the law of the case of *Robinson v. Kellum,* 6 Cal. 399, and *Vesper v. Crane Co.,* 165 Cal. 36, Appellee has no quarrel with the principles of law promulgated in those cases. Those cases pertain to a suit by a successful defendant against an attaching plaintiff in which case the issues of malice or lack of probable cause are very definitely to be considered. However, Appellee's case involves trespass to an innocent stranger to the litigation between the attaching party and the defendant VillaSenor.

It is an accepted rule that the Courts place a heavy burden on a party to a litigation to prove a clear abuse of civil processes, before affording the injured party a

claim for damages. The Courts demand clear proof of malice or lack of probable cause to satisfy that burden.

The above burden of proof of malice or lack of probable cause is not placed upon an innocent party who has his property attached by a plaintiff in the mistaken belief that it is the property of the defendant. The mere unwarranted exercise of dominion over the innocent party's property *is a trespass*. The law pertaining to the recovery of damages for trespass is too well established for appellee to cite cases in its support.

3. This Court in its opinion quoted a conclusion of law of the District Court which stated:

> ". . . and that the fact the defendants did not act with malice or ill will, or without probable cause, does not excuse the said defendants from the damages caused plaintiff by said defendants."

Since this case is clearly one of trespass the conclusion of law cited above is correct; for it is immaterial whether the Appellant did or did not act with malice or ill will or lack of probable cause, for a recovery of damages for trespass does not contemplate these issues at all.

It was clearly established in the early stages of this litigation by stipulation of the parties and by order of Court as shown by the "Stipulation of Facts and Issues and Pre-trial Order [Tr. of Rec. pp. 16-23], that the issues of malice and lack of probable cause were not to be considered any further; since they were excluded from

the statement of issues to be tried [Tr. of Rec. pp. 21, 22 and 23].

The parties to this litigation and the Trial Court framed the trial issues of this case to either prove or disprove trespass, and in the event trespass was proved, whether any damage to Appellee resulted therefrom. No issues of wrongful attachment with malice or lack of probable cause supporting it, were ever considered or mentioned at the actual trial of this action.

Conclusion.

We respectfully urge this Court to grant this Petition for Rehearing and to affirm the judgment granted by the District Court in favor of Appellee.

Newman & Newman,
Joseph Galea,
By Anthony M. Newman,
Attorneys for Appellee.

Certificate of Counsel.

We, Counsel for Appellee of the above entitled cause do hereby certify that the foregoing Petition for Ruling is, in our opinion, well founded and is not interposed for delay.

Newman & Newman,
Joseph Galea,
By Anthony M. Newman,
Attorneys for Appellee.

No. 13672

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY J. COFFMAN,

Appellant,

vs.

COBRA MANUFACTRING COMPANY,

Appellee.

BRIEF OF APPELLANT

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FILED
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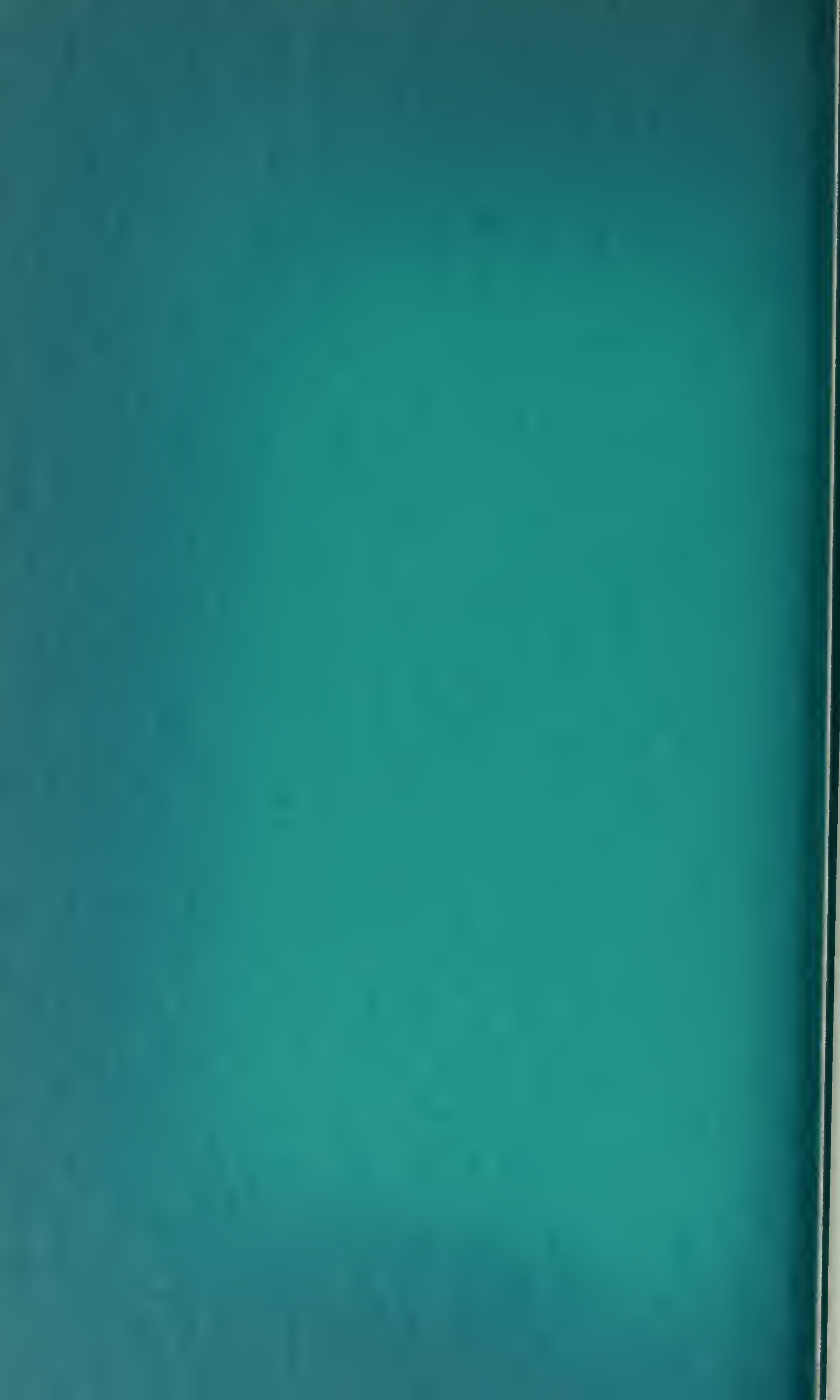

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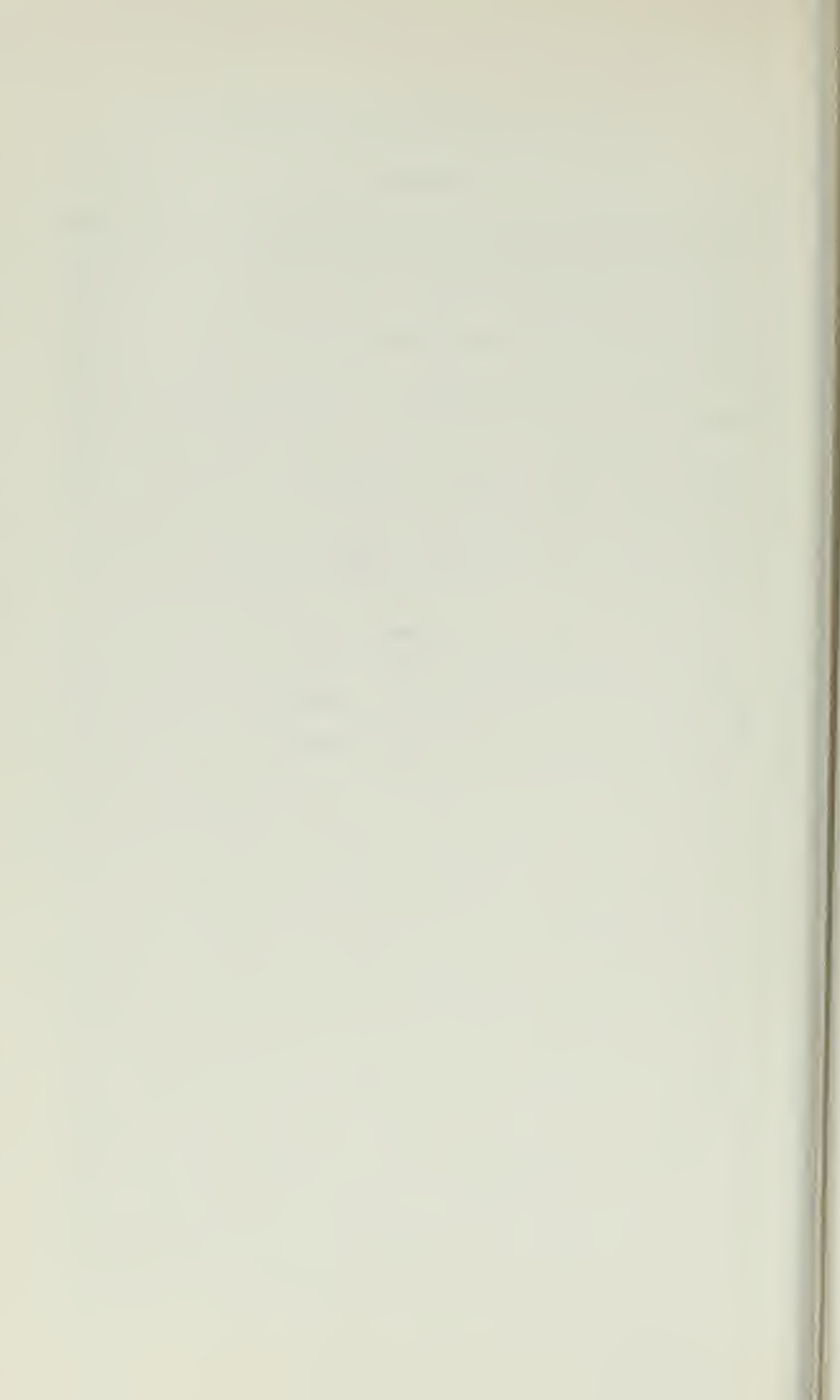

No. 13672

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Harry J. Coffman,

Appellant,

vs.

Cobra Manufactring Company,

Appellee.

BRIEF OF APPELLANT

Preliminary Statement.

From an Order adopting an approving Original and Supplemental Reports of a Special Master, in proceedings supplemental to execution, made by the District Court for the Southern District of California, Central Division, the Honorable Peirson M. Hall, Judge Presiding, appellant Harry J. Coffman prosecutes this appeal.

Statement of Pleadings and Facts Disclosing Jurisdiction.

(1) The statutory provisions sustaining the jurisdiction of the District Court of the United States are found in Federal Rules of Civil Procedure, Rule 69(a).

Jurisdiction of this Court is based upon Title 28, U. S. Code, Section 1291; and Title 11, U. S. Code, Section 47.

(2) The pleadings in this case consist of an Affidavit for Order of Appearance of Judgment Debtor and Others, in which it is recited that a judgment was entered in favor of Cobra Manufacturing Company against California Aircraft Engineering Company in the District Court in the sum of $6,254.25; that execution had been returned unsatisfied; that appellant had property of the judgment debtor and was indebted to the judgment debtor in an amount exceeding $50.00. An order was sought by the judgment creditor for the examination of appellant concerning any property of or indebtedness to the said judgment debtor California Aircraft Engineering Company [R. 27-29].

Statement of the Case.

In March, 1946, Cobra Manufacturing Company (herein designated as "Cobra") filed a petition seeking an arrangement under Chapter XI of the Bankruptcy Act [R. 3]. During the course of the proceedings California Aircraft Engineering Company (herein designated "Aircraft Company") filed a claim for $1,868.16, to which objections were filed by the debtor in possession upon several grounds, including a claim that Aircraft Company was indebted to Cobra in the sum of $6,254.25 [R. 5-6]. The claim of Aircraft Company and the objections of Cobra thereto were heard by a Referee in Bankruptcy, who found against the claim and in favor of the counterclaim and made an Order reading as follows:

> "It is Hereby Ordered, Adjudged and Decreed that California Aircraft Engineering Co. has no claim against the above-entitled estate and that their claim should be disallowed.

> "It is Further Ordered, Adjudged and Decreed that California Aircraft Engineering Co. is indebted to Cobra Manufacturing Corporation for the sum of Six Thousand Two Hundred Fifty-four and 25/100 Dollars ($6,254.25)." [R. 8-11.]

The Order so made by the Referee was affirmed by the District Court upon Petition for Review by its judgment stating as follows:

> ". . . It is Ordered, Adjudged, and Decreed that the Referee's Findings of Fact, Conclusions of Law and Order, entered on the 20th day of May, 1947, be and the same is hereby affirmed." [R. 5.]

Execution on this judgment having been returned unsatisfied, proceedings supplemental to execution were instituted and an Order was made for the examination of appellant Harry J. Coffman (herein designated as "Coffman") [R. 12, 25, 30, 31]. A Special Master was appointed to take the testimony and to make his report, findings and conclusions to the Court [R. 31-34].

At the hearing before the Special Master the following facts were developed:

The judgment which Cobra had obtained against Aircraft Company was for services rendered and materials furnished between May, 1945 and April, 1946 [R. 8-10, 257-258].

Aircraft Company had been incorporated in the year 1943 as a California corporation, its principal purpose being to engage in war work, that is, the assemblying of aircraft components [R. 130]. Coffman, his wife and daughter owned all of the outstanding 250 shares of the corporation, Coffman owning 150 shares, his wife 50 shares, and his daughter 50 shares [R. 131, 170]. At all

times since its organization Coffman has been President and Director of Aircraft Company.

Aircraft Company had two plants, one located on Pico Boulevard and the other on LaBrea Boulevard, in Los Angeles [R. 194]. The LaBrea premises were held under a lease executed to the company and to Coffman jointly, as co-lessees [R. 183-184].

With the coming of V-J Day in 1945, and the consequent cancellation of aircraft contracts, the war work in which Aircraft Company had been engaging came to an end [R. 179, 193, 194]. In order to comply with the terms of the lease which became operative at the cessation of hostilities, and at the expense of several thousand dollars to himself, Coffman dismantled the manufacturing facilities which had been installed on the premises at La Brea Boulevard and restored the building to its original condition, that is as an automobile sales agency [R. 195, 196, 199, 204].

Both Aircraft Company and Coffman thereupon made use of the reconverted premises for business purposes. For a few months Aircraft Company operated an automobile agency therein, distributing Willys Jeep automobiles and conducting a general garage business [R. 197, 209, 210, 216]. The general management of Aircraft Company then passed from Coffman to the Vice-President of the company, a man named E. E. Brown, who was experienced in the manufacture of vending machines [R. 236, 237]. Aircraft Company thereupon devoted its activities to the business of developing vending machines, an iron lung, a portable tractor, a certain type of spark plug and various other items for civilian use [R. 8-10, 179, 236-237].

In November, 1945, Coffman obtained a Nash automobile distributorship in Los Angeles and established a sales agency at the LaBrea premises, where he did business under the name of Nash-Wilshire [R. 190]. In the conduct of the Nash agency Coffman opened commercial accounts at the same banking institutions where Aircraft Company had its accounts. One such account was established by Coffman at Hollywood State Bank in 1945. The other was opened at Bank of America in December, 1945 [R. 140, 143]. At no time were funds belonging to Aircraft Company transferred to Nash-Wilshire accounts [R. 140-141].

In October, 1945, the net worth of Aircraft Company as appeared upon its books was in the sum of approximately $20,000.00 [R. 194; Ex. "2"]. The net worth was not distributed to anyone, the assets represented thereby became worthless after the war was over [R. 239-240].

The books and records kept in the ordinary course of business of both Nash-Wilshire and Aircraft Company disclosed the following: In May, 1945, Aircraft Company owed Coffman approximately $12,500.00. This sum was reduced by loans, advances and withdrawals in favor of Coffman and was finally liquidated by December, 1945. Thereafter, during 1946 and 1947 Coffman's indebtedness on the books to Aircraft Company amounted to the maximum sum of $9,240.00, while Aircraft Company's indebtedness to Coffman increased to the sum of $12,-207.00, leaving a net balance in favor of Coffman in the sum of $2,966.00. The net indebtedness shown by the books and records of Aircraft Company and Nash-Wilshire was in favor of Coffman to the amount of

$2,966.93 at all times from and after September, 1949 [R. 65-66].

At the conclusion of the hearings in which the foregoing facts were developed the Special Master filed with the District Court his Report and Findings, in which he concluded and recommended that Coffman be ordered to pay to Cobra the amount of Cobra's judgment against Aircraft Company [R. 47, 53]. Thereafter Coffman filed Exceptions to the Findings of the Special Master, which resulted in an Order of Reference being made to the Special Master for the purpose of determining whether Aircraft Company was indebted to Coffman, as set forth in its books and records [R. 58-80].

Without the taking of further testimony or evidence (neither side offering the same) the Special Master made his Supplemental Report, Findings of Fact and Conclusions of Law, under which it was found that Aircraft Company was not indebted to Coffman as set forth in the books of Aircraft Company, and in which it was concluded that Coffman's denial of his indebtedness to Aircraft Company was not in good faith and that he was not entitled to an offset in the amount of the indebtedness claimed by him against Aircraft Company [R. 80-93]. Coffman thereupon applied to the Court to reject the Supplemental Report, Findings of Fact and Conclusions of Law, upon written objections thereto [R. 94-100].

This application was denied and a formal Order was thereupon made by the Court adopting and approving the Report and Supplemental Report of the Special Master, and ordering Coffman to pay to Cobra the sum of $6,-254.00, the amount of Cobra's judgment against Aircraft Company [R. 123-125].

Specification of Errors.

(1) The Court erred in making and rendering its Order for Appearance and Examination of Judgment Debtor and Others [R. 30-31]. The ground of said specification of error is that the judgment upon which said Order is based is void.

(2) The Court erred in making and rendering its Order Appointing United States Commissioner Howard V. Calverley as Special Master, vesting said Master with the powers specified in said Order [R. 31-33]. The ground of this specification of error is that the judgment upon which said Order is based is void.

(3) The Special Master erred in making the following Findings of Fact in his Report and Findings of Special Master:

> 1. "That Harry J. Coffman as dominant and controlling stockholder and president of the California Aircraft Engineering Company, a California corporation, at the time the debt arose between said corporation, and at the time the judgment was entered herein, occupied a fiduciary relationship toward the Cobra Manufacturing Company, a creditor of said California Aircraft Engineering Company;" [R. 52].

The foregoing Finding of Fact is specified as being erroneous for the reason that there is no evidence that at the time the debt arose or at the time the judgment was entered Coffman occupied a fiduciary relationship toward Cobra or which was in any manner violated.

> 2. "That from May 1, 1945, to and including June 30, 1948, Harry J. Coffman appropriated funds of the California Aircraft Engineering Company to his own use and benefit, said funds totalling $9,-240.46;" [R. 52].

The foregoing Finding of Fact is specified as being erroneous for the reason that there was no evidence that Coffman appropriated funds of Aircraft Company to his own use and benefit in the amount of $9,240.46, or any other sum. The evidence was to the effect that such funds totaling $9,240.46 were loans and advances of Aircraft Company to Coffman [see Account No. 180 of the General Ledger of California Aircraft Engineering Company at pages 43 and 44, received in evidence in the trial court, a photostatic copy of which is attached to page 46 of the Transcript of Record herein].

> 3. "That the appropriation of funds of the California Aircraft Engineering Company by Harry J. Coffman in the total sum of $9,240.46 was wrongful and in breach of trust and directly caused the financial inability of the California Aircraft Engineering Company to pay the judgment obtained by the Cobra Manufacturing Company on November 5, 1947, in the sum of $6,254.25;" [R. 53].

The foregoing Finding of Fact is specified as being erroneous for the reason that there is no evidence whatsoever that the loans or advances of funds from Aircraft Company to Coffman were wrongful or a misappropriation or a breach of trust or directly or otherwise caused the inability of the Aircraft Company to pay the judgment of Cobra.

> 4. "That Harry J. Coffman is indebted to the California Aircraft Engineering Company, a California corporation, in the sum of $9,240.46" [R. 53].

The foregoing Finding of Fact is specified as being erroneous for the reason that it is contrary to and not supported by the evidence; the General Ledger of Aircraft

Company shows that ever since October 31, 1947, and long prior to the hearings involved in this case Aircraft Company was indebted to Coffman in the sum of approximately $2,966.00 over and above all offsets. [See photostatic copy of Account No. 99-6 showing a total indebtedness of Aircraft Company to Coffman in the sum of $12,207.39 [R. 66].]

> 5. "That Harry J. Coffman does not deny, in good faith, that he is in debt to the California Aircraft Engineering Company, a California corporation, in the sum of $9,240.46." [R. 53.]

The foregoing Finding of Fact is specified as being erroneous for the reason that said finding is contrary to and not supported by the evidence at the hearings, said evidence showing that Coffman at the hearings before the Special Master produced books and records of Aircraft Company showing it to be indebted to Coffman in excess of the amount of Coffman's indebtedness to the Aircraft Company in the sum of $2,966.00, as aforesaid, and by Coffman's Exceptions and Objections to said finding made in the District Court [R. 63-64] and the Order of Re-reference by the Court upon said objections [R. 77-80].

(4) The Special Master erred in making his Conclusion of Law that:

> ". . . Harry J. Coffman should be ordered by the District Court to pay to the Cobra Manufacturing Company, a corporation, the sum of $6,254.25, the amount of the judgment which the Cobra Manufacturing Company has obtained against the California Aircraft Engineering Company, together with interest at the rate of 6% from the date of judgment, namely, November 5, 1947, and costs." [R. 53.]

The foregoing Conclusion of Law is specified as being erroneous for the reason that it is not supported by the Findings of Fact nor by the evidence, as is hereinabove indicated in Specification of Errors 1, 2, 3, 4 and 5.

(5) The Special Master erred in making the following Supplemental Finding of Fact:

> "It is not true that the California Aircraft Engineering Company, a corporation, was indebted to Harry J. Coffman in the sum of $12,207.39 on June 30, 1948, as set forth in the books and accounts of said Aircraft Company and as would appear from Exhibit B attached to the exceptions to the Report and Findings of the Special Master."

The foregoing Finding of Fact is specified as being erroneous for the reason that there is no evidence whatsoever supporting such finding.

(6) The Special Master erred in making Supplemental Conclusions of Law reading as follows:

> "It is concluded that Harry J. Coffman does not deny his indebtedness to the California Aircraft Engineering Company, a corporation, in the sum of $9,240.46, in good faith and is not entitled to the offset of $12,207.39 claimed by him as appears in Exhibit B attached to the exceptions to the Report and Findings of the Special Master, against the indebtedness of Coffman to the said California Aircraft Engineering Company."

The foregoing Conclusion of Law is specified as being erroneous for the reason that it is not supported by the evidence as is hereinabove indicated as Specifications of Error No. 3.

(7) The Court erred in making its Order Adopting and Approving Original and Supplemental Reports of Special Master Filed October 16, 1951, and March 11, 1952, and Allowing Special Master an Additional Fee of $200.00 [R. 123-125], and in connection therewith erred in overruling:

(1) The objections to Report and Findings of Special Master, the Exceptions and Objections interposed by Coffman [R. 58-65], based upon the ground that said Report and Findings therein were contrary to and not supported by the evidence; and for want of jurisdiction; and

(2) The Exceptions and Objections interposed by Coffman to Supplemental Report, Findings of Fact and Conclusions of Law of Special Master [R. 94-100], based upon the ground that said Supplemental Report, Findings of Fact and Conclusions of Law were contrary to and not supported by the evidence; and for want of jurisdiction.

Summary of Argument.

I.

(1) A Valid and Enforceable Judgment is a Condition Precedent to the Institution of Proceedings Supplemental to Execution.

(2) A Referee in Bankruptcy is Without Power to Render a Judgment Against a Creditor Upon a Counterclaim Interposed to the Creditor's Claim in Excess of the Amount of Such Creditor's Claim.

The claim of Cobra in this proceeding rests upon such a Referee's Order which is void for want of jurisdiction and which, therefore, cannot form the basis of proceedings supplemental to execution.

(3) The Judgment which is the Basis of the Supplemental Proceedings Herein is Not an Enforceable Judgment for Money Upon Which Execution May Issue or for Which Supplemental Proceedings is Authorized.

Such Judgment is a mere finding of the existence of an indebtedness and does not rise to the dignity of a true judgment for the recovery of money by one party to an action against another.

II.

In Proceedings Supplemental to Execution a Denial of the Indebtedness Alleged or the Claim of a Substantial Dispute Thereto Ousts the Court of Jurisdiction to Determine the Existence of the Indebtedness or the Conflicting Claims of the Parties.

The indebtedness of appellant to Cobra was more than offset by the indebtedness of Cobra to appellant, as appears from the books and records of the debtor Aircraft Company.

III.

Assuming, *arguendo,* the Jurisdiction of the Master, His Findings of Fact are Contrary to and Not Cupported by the Evidence and his Conclusions and the Order of Court Based Thereon Are Against Law Because (1) There was No Evidence that Appellant Possessed Property of or Was Indebted to Aircraft Company; and (2) Under Local Law a Court Cannot Order the Payment to a Judgment Creditor of an Indebtedness Alleged to be Due From a Third Person to the Judgment Debtor.

ARGUMENT.

I.

A Valid and Enforceable Judgment Is a Condition Precedent to the Institution of Proceedings Supplemental to Execution.

(1) The general rule is that the recovery and entry of a valid judgment for the payment of money is a condition precedent to the institution of supplementary proceedings 33 C. J. S. *Executions,* Sec. 360, p. 662; *Liueza v. Brinkerhoff,* 29 Cal. App. 2d 1 (83 P. 2d 976).

In this same connection it is established, absent any statute of the United States, that the procedure on executions and supplemental proceedings is governed by local practice and procedure, Rules of Civil Procedure, Rule 69(a); *Bair v. Bank of America Nat. Trust & Savings Ass'n,* 112 F. 2d 247 (C. C. A. 9). No federal statute has been found applicable to the procedure involved in proceedings supplemental to execution; therefore, the California statutes and law govern. The pertinent California Code sections dealing with such subject are found in the Appendix (Calif. Code of Civ. Proc., Secs. 684, 717, 719, 720).

Under these code sections, as above indicated, supplemental proceedings cannot be instituted unless there is a valid and enforceable money judgment which is unsatisfied.

(2) The judgment for which execution was sought in this case and upon which Coffman's examination was predicated has already been set forth at pages 3-4 of this Brief. To recapitulate, it was a judgment entered by a Referee in Bankruptcy upon a counterclaim interposed by the debtor in possession to a creditor's claim filed by Aircraft Company.

It has been held upon numerous occasions in this Circuit that in bankruptcy a referee is without jurisdiction to render a judgment based upon a counterclaim or offset for the excess thereof over the creditor's claim; that such a judgment is void, and that the relief which is thus desired must be obtained in a plenary action. *In re Continental Producing Co.* (D. C. Cal), 261 Fed. 627; *In re Florsheim,* 24 Fed. Supp. 991 (D. C. Cal.); *In re Bowers,* 33 Fed. Supp. 965 (D. C. Cal.).

The foregoing cases clearly hold that the Referee's judgment which was affirmed by the petition for review herein was unauthorized and made and rendered without jurisdiction. Consequently such judgment could not form the basis of an execution or proceedings supplemental to execution.

(3) Critical analysis of the judgment made and rendered by the referee compels the conclusion that it is not such a judgment for recovery of money as permits the issuance of execution thereon; it is merely a finding of the existence of an indebtedness insufficient to sustain the usual process for enforcement. In this respect the order of the referee herein finding that Aircraft Company is indebted to Cobra is on all fours with the order made by the court in the case of *In re Continental Producing Co.,* 261 Fed. 627, *supra.* The court at page 628 of the opinion states:

> "*In this connection, although it is admitted that such a finding would not of itself constitute an enforceable judgment against the creditor,* yet it is urged that such finding would be conclusive against him, and that, in a suit thereafter to be brought upon the alleged overplus that found to be due, he would be estopped from urging any defense other than that of

payment. *Breit v. Moore,* 220 Fed. 97, 99, 135, C. C. A. 573. That is, in any subsequent suit, the merits of the claim would not be inquired into, on the ground that there had been an adjudication had in the matter, and that the same question could not again be litigated. *The net result is that, though the finding of the referee with respect to the counterclaim of the trustee does not, in form, constitute a judgment against the creditor,* yet it does in substance, in that the creditor is estopped to go behind the finding thus made, and the only defense he would have to a subsequent suit brought to secure an enforceable judgment would be the defense of payment made. . . ." (Italics ours.)

Similar holdings are found in the California cases where the subject has been under consideration. In *Bank of America v. Standard Oil Co.,* 10 Cal. 2d 90 (73 P. 2d 903), a judgment was made by the Court in a declaratory relief action ordering a trustee to pay to certain parties 91% of the funds in its possession. On appeal it was held by the Supreme Court of California that this was not a money judgment upon which execution could issue, the Court stating as follows:

". . . This judgment is not a complete determination of the rights of the trustee and the claimants to the fund. As between the trustee and the ranch company it is an adjudication that the latter is entitled to a specified percentage of the net proceeds of the trust fund as against the claims of the defendants who have not appealed from it. But it is not a judgment upon which execution may issue. An execution must refer to the judgment and state 'if it be for money the amount thereof, and the amount actually due thereon.' (Sec. 682, Code Civ. Proc.)"

In *Wellborn v. Wellborn,* 55 Cal. App. 2d 516 (131 P. 2d 48), in a suit for annulment, the Court decreed that the defendant had a $1,250.00 lien on certain real and personal property belonging to the plaintiff. In holding that this was not a judgment upon which execution could issue the Court stated at page 524 as follows:

> ". . . It is interesting to note that in the case at bar, while the judgment established a lien in the sum of $1,250 there were no conditions or time set for the payment of it. All the more reason why execution would not be the proper remedy . . ."

In *Hennessey v. Puertas,* 99 Cal. App. 2d 151 (221 P. 2d 321, in a declaratory relief action relating to the rental due under lease the parties stipulated that judgment should be entered in favor of the plaintiff and against defendant, providing that plaintiff should be entitled to rents from the defendant at a certain monthly rent. Pursuant to the stipulation judgment was entered providing that the defendant pay to plaintiff the specified rents, subject to the terms and conditions of the lease. In holding that this judgment would not sustain execution because it was not a judgment for money, the Court at page 154 of the opinion states as follows:

> ". . . The plaintiff's complaint in the action sought only declaratory relief, with an incidental award of costs and attorney's fees. The stipulation for judgment does not provided that plaintiff shall recover $75 per month from defendant but that 'said plaintiff *shall be entitled to rents* from said defendant for the premises described in said lease' of $75 per month. The inept language of the judgment, that defendant 'pay to plaintiff' $75 per month, cannot control, in view of the record above recited

and the further language of the judgment that such payment is 'subject to the terms and conditions of that certain lease.' The plaintiff by his action sought only declaratory relief; the stipulation for judgment clearly contemplated only declaratory relief; and the judgment itself, while it provides that defendant 'pay . . . to plaintiff,' further provides that such payment is 'subject to' the terms of the lease.

"The only reasonable construction is that the judgment constitutes a declaration of the rights and duties of the parties under the provisions of the lease, and no more . . ."

To the same effect see *McKay v. Coca-Cola Bottling Co.*, 110 Cal. App. 2d 672 (243 P. 2d 135).

Applying the principles specified in the foregoing decisions and in Points (1), (2) and (3) herein discussed, it is manifest that there is absent the essential prerequisite to the sustaining of the jurisdiction of the trial court to proceed herein, namely, the existence of a valid, enforceable judgment against Cobra. The only judgment in this case is the judgment made by the referee, which, as appears from the authorities set forth, was void for want of jurisdiction. On the other hand, even if viewed as being within the powers of the referee, nevertheless, the judgment does not amount to a money judgment for it is no more than a declaration of the existence of an indebtedness. It is not a final determination of the rights of the parties within the meaning of a judgment, as defined by California Code of Civil Procedure, Section 577, as follows:

"A judgment is the final determination of the rights of the parties in an action or proceeding."

II.

In Supplementary Proceedings a Denial of the Indebtedness or Substantial Dispute Thereto Ousts the Court's Jurisdiction to Determine the Existence of the Indebtedness or the Conflicting Claims of the Parties.

Both by code and by the decisions, the law of California is established to the effect that the Court is without jurisdiction to make an order on supplementary proceedings directed against a third person where such third person denies the debt or claims an interest in the property adverse to the judgment debtor.

> Cal. Code of Civ. Proc., Sec. 719;
>
> *McDowell v. Bell,* 86 Cal. 615, 25 Pac. 128;
>
> *Lewis v. Chamberlain,* 108 Cal. 525, 41 Pac. 413;
>
> *Miller v. Superior Court,* 82 Cal. App. 634, 256 Pac. 431;
>
> *Blake v. Blake,* 86 Cal. App. 377, 260 Pac. 937;
>
> *Takahashi v. Kunishima,* 34 Cal. App. 2d 367, 93 P. 2d 645.

The law on the subject is summarized with particular applicability to the facts of the instant case in *Wulfjen v. Dolton,* 24 Cal. 2d 878, 889, 151 P. 2d 840, where the Court states as follows:

> "Appellant, in pursuance of her judgment against the corporation, caused to be served on the respondents Dolton and King a writ of execution, which

was returned by the sheriff '*nulla bona*'; thereafter said respondents were examined in supplementary proceedings, each denied any debt or obligation to the corporation, and each claimed an interest in the property of the judgment debtor adverse to it and to the appellant. *Upon such denial of liability, continued pursuit of the statutory procedure would be of no avail to the appellant,* . . . Proceedings supplementary to execution are wholly inadequate where the grantee or transferee of a judgment debtor asserts title in himself, for the reason that *to make an order directing the application of property claimed by a person in his own right would be to deprive him of his property upon a summary proceeding and without due process of law* . . . Where a judgment creditor claims that title under a conveyance or transfer is invalid, an issue as to such ownership and title should be properly made and tried in an appropriate action in which a judgment may be had and the parties conclusively bound." (Italics ours.)

The principles expressed in the foregoing decisions in California law are clearly applicable to the facts of the instant appeal. Although the evidence in this case showed that Coffman was indebted to Aircraft Company in the sum of $9,240.00, the evidence also affirmatively showed that Aircraft Company was indebted to Coffman in the sum of $12,207.39, and that, therefore, Coffman's obligation to Aircraft Company was more than offset. [R. 40; Account No. 99-6 of Aircraft Company showing in-

debtedness in favor of H. J. Coffman, doing business as Nash-Wilshire, in the sum of $12,207.39.]

In California where facts are proved on behalf of the party examined in supplementary proceedings showing that the indebtedness alleged is non-existent, or that it is disputed or offset, the Referee loses summary jurisdiction.

> *Miller v. Superior Court,* 82 Cal. App. 634, 256 Pac. 431.

Proof of the account [R. 40] showing the offset in favor of Coffman was, therefore, sufficient to divest the Court of power to make an order in the proceedings directed against Coffman.

Under the facts as herein set forth and the cited authorities, the Special Master committed error in making his Findings of Fact in the original and supplementary reports and the Conclusions of Law therein specified, and the Court erred in adopting the same for the reason that upon the presentation of substantial evidence of a denial of or dispute as to the indebtedness between Coffman and Aircraft Company, the judgment creditor's only remedy was to institute a plenary action at law.

III.

Assuming, Arguendo, the Jurisdiction of the Master, His Findings of Fact Are Contrary to and Not Supported by the Evidence and His Conclusions and the Order of the Court Based Thereon Are Against Law Because (1) There Was No Evidence That Appellant Possessed Property of or Was Indebted to Aircraft Company; and (2) Under Local Law a Court Cannot Order the Payment Creditor of an Indebtedness Alleged to Be Due From a Third Person to the Judgment Debtor.

In approaching this phase of the argument, the attention of the court is respectfully directed to its opinion in *Adams v. Northern Pacific Railway Company,* 115 F. 2d 768, 779 (C. C. A. 9), where it is stated as follows:

> "The Railway Company contends that our power to review the decision of the lower court predicated upon the master's report is restricted by rule 53(e) (2) of Civil Procedure, 28 U. S. C. A. following section 723c, which reads as follows: 'In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous.' *This rule, of course, regulates the conduct of the trial judge and not that of the appellate court.* It is not a new rule but a restatement of an old and well-established rule. *Camden v. Stuart,* 144 U. S. 104, 12 S. Ct. 585, 36 L. Ed. 363; *Girard Ins. Co. v. Cooper,* 162 U. S. 529, 16 S. Ct. 879, 40 L. Ed. 1062. It is sufficient for the purpose of this case to say that we are not dealing with a question of specific findings of fact based upon the testimony of

> witnesses whose credibility is to be determined by the master and trial court but with a series of inferences predicated upon admitted facts resulting in ultimate conclusions as to value." (Italics ours.)

In determining whether the evidence is sufficient to sustain a finding on appeal, it is held in *Pallma v. Fox,* 93 F. Supp. 134, 139 (Dist. Col.); *Kenny v. Washington Properties,* 128 F. 2d 612 (C. C. A., Dist. Col.):

> "In order to make a finding from an inference, the inference must be based on probability and not possibility and must be reasonably drawn from and supported by the facts on which they purport to rest, and may not be the result of mere surmise and conjecture. There must be facts proved from which the inference can be drawn and an inference of fact may not be drawn from a premise which is wholly uncertain."

(1) There Was No Evidence That Appellant Possessed Property of or Was Indebted to Aircraft Company.

Bearing in mind the foregoing principles dealing with the sufficiency of the evidence examination of the record in this case shows that there was a total absence of any evidence indicating that appellant possessed property of or was indebted to Aircraft Company.

In making his Findings and Conclusions in favor of Cobra, the Special Master adopted Cobra's contentions that Coffman was a fiduciary with respect to the creditors of Aircraft Company, that he was required to account to them for the use of corporate funds, that he was not entitled to use such funds for his own benefit to the detriment of other stockholders and creditors of the corporation, that after the war he appropriated the assets

of Aircraft Company to finance Nash-Wilshire and that this transfer stripped Aircraft Company of all of its property and made it impossible for it to pay the judgment [R. 49-50]. Furthermore, without taking any evidence whatsoever, the Special Master on the Order of Rereference held that the books and records of Aircraft Company showing the $12,207.00 in favor of Coffman were not entitled to credit because the account upon which it was based lacked "integrity" [R. 91-92]. These findings by the Special Master which went into his report and which were adopted by the Court were clearly based upon speculation and were contrary to the evidence submitted in the case.

The singling out by the Special Master of that portion of the books and records of Aircraft Company establishing a net credit and offset in favor of Coffman in the sum of $12,207.00 as lacking "integrity" cannot be justified in view of the presumptions of regularity created by the Uniform Business Records as Evidence, Act, which is part of the law of California (Cal. Code Civ. Proc., Sec. 195(e), (f), (g), (h)).

The entries in the books of Aircraft Company are *prima facie* evidence of liability amounting to admissions against it. *Wallace v. Oswald,* 57 Cal. App. 333 (207 Pac. 51). Further, in none of the proceedings before the Special Master was the Nash-Wilshire account on the books of Aircraft Company challenged. This account is contained in the same books and records of Aircraft Company containing Account No. 180, the basis for the claim that Coffman is indebted to Aircraft Company in the sum of $9,240.00, as appears from the analysis introduced in evidence as Exhibit "9".

It is impossible to see how one account, namely Account No. 180, of Aircraft Company, possesses "integrity" while the other account, No. 99-6, lacks "integrity".

Nor did Aircraft Company cease doing business in 1945. Aircraft Company continued in business after 1945, devoting its activities not only to the sale of jeeps, but to the development of vending machines, portable tractors, iron lung, spark plug and other items, and in connection therewith maintained an active business requiring payroll accounts [R. 8-10, 179, 236-237].

There is no evidence whatsoever that the assets of Aircraft Company were misappropriated by Coffman or used by him in connection with his businesses or that any cash belonging to Aircraft Company was used in the establishment or operation of Nash-Wilshire. The evidence was to the contrary. Cobra's own witnesses established that the funds in the bank accounts belonging to Aircraft Company never were transferred to Nash-Wilshire [R. 140-141].

From the foregoing analysis of the facts of this case, the conclusion is inescapable that there was a total want of proof of any indebtedness in favor of Aircraft Company by Coffman on the possession of any funds, property or other assets belonging to Coffman by Aircraft Company. Furthermore, the mere fact that Coffman may have received payments by way of loans and advances between 1945 and 1946, as indicated by creditor's Exhibit "9", amounting to the sum of $9,240.00 does not indicate that he had such funds in his possession at the time of the hearings herein. In *Hammer v. Downing,* 66 Pac. 916 (Ore.), the Court held that a finding of present possession of money could not be supported by proving that the debtor had such sums within three

months from the date of the hearing. In the instant case the last payment by Aircraft Company to Coffman occurred more than two years prior to the hearings. There is clearly no evidence that Coffman possessed any funds of and certainly no property of Aircraft Company was shown to be in his possession.

There is likewise no evidence whatsoever to support the Special Master's Supplemental Conclusion of Law that Coffman does not deny his indebtedness to Aircraft Company in good faith and is not entitled to the offset claimed by him [R. 81]. Continuously at the trial level Coffman maintained that he was entitled to the offset which the books and records of Aircraft Company and Nash-Wilshire showed him to be entitled to.

In Briefs filed before the Special Master [R. 50-51]; in Exceptions to the Report and Findings of Special Master [R. 61-66]; in Application to Reject Supplemental Report, Findings of Fact and Conclusions of Law of Special Master [R. 94-100]; and Motion for Leave to Re-argue Objections and to Reconsider Ruling [R. 103-104] Coffman asserted his right to the offset claimed and the denial of any indebtedness to Aircraft Company.

The principle involved here akin to the rules applicable to a Referee in Bankruptcy exercising jurisdiction against an adverse claimant. On this particular point the law summarized in 2 Collier on Bankruptcy, Sec. 23.06, p. 502 as follows:

> ". . . Where property is in possession of a third person holding under an alleged preferential transfer, or an alleged fraudulent transfer, such fact will not entitle the bankruptcy court summarily to order its delivery, and the claimant is entitled to a plenary suit. It does not follow that because the property

was allegedly transferred within the prohibited period in such a way as to constitute a preference or fraudulent transfer, that the transferee may be subject to summary jurisdiction; he may have a valid claim notwithstanding the transfer. Nor may a claimant be directed summarily to surrender property in his possession upon the mere allegation that the claimant's interest is not in good faith and that the trustee or receiver intends to attack the claim on the ground that it is preferential or fraudulent. . . ."

At page 510 the author continues:

"Whether or not a claim is adverse so as to defeat summary jurisdiction depends upon whether the claim is substantial and real, or merely colorable. An adverse claim is substantial if the evidence offered as a basis is sufficient, if uncontroverted, to establish the validity of a claim; but a claim is not to be deemed merely colorable, so as to give the bankruptcy court summary jurisdiction, if its validity depends upon disputed facts as to which there is a conflict of evidence as well as a controversy in matter of law. . . ."

These principles, it is submitted, apply here. At all times there has been a substantial claim made by Coffman which if uncontroverted would establish the validity thereof and under such circumstances the Special Master was with no more power to act upon the proceedings before him than a Referee in Bankruptcy.

It must necessarily be concluded, then, that the Findings and Conclusions of the Special Master rest upon suspicion, conjecture, and are without any legal evidence sufficient to warrant the making thereof; and that the Specifications of Error assigned by appellant herein to the effect that

the Special Master erred in making his Findings of Fact and Conclusions of Law in the Original and Supplemental Reports, and that the Court erred in adopting the same and making the Order and Judgment appealed from over the Objections and Exceptions of appellant are sustained.

(2) Under Local Law a Court Cannot Order the Payment to a Judgment Debtor of an Indebtedness Alleged to Be Due From a Third Person to a Judgment Debtor.

The general rule is that an indebtedness cannot be ordered paid by a third person under a statute authorizing an order requiring the delivery of "money" or "property" belonging to or under the control of the debtor. (33 C. J. S. *Executions,* Sec. 383, p. 969.)

The Court, under California Code of Civil Procedure, Sec. 719, can order tangibles only to be delivered by the debtor of the judgment debtor toward the satisfaction of the judgment for there is no direct liability in favor of a judgment creditor by third persons indebted to the judgment debtor (Secs. 714 to 721 of the Code Civ. Proc.).

As stated in *Farmers & Merchants Bk. v. Bank of Italy,* 216 Cal. 452 (14 Pac. 527):

> ". . . By the express terms of section 544 persons indebted to the judgment debtor are, upon receiving notice that such debts are attached, made directly liable to the attaching creditor. But no such direct liability is provided for in the sections supplementary to execution. . . .
>
> ". . . It must be remembered that whatever rights appellant may have against respondent exist solely by virtue of statute. The respondent is not indebted to appellant—there is no privity between a judgment creditor and his debtor's debtor. . . ."

Under similar statutory provisions, the law of New York is the same. See *Matter of Delaney,* 256 N. Y. 315, 176 N. E. 457, where the Court, in deciding that a bank holding funds on deposit belonging to the judgment debtor could not be compelled in supplemental proceedings to pay such deposit to a judgment creditor, stated as follows:

> ". . . The money deposited with the bank belongs to the bank and is not the property of the depositor. The property of the depositor is the indebtedness of the bank to it. . . . The debt might have been satisfied under Civil Practice Act, section 792, before the appointment of a receiver under an order *permitting* the payment of the debt to the sheriff. No such order was obtained and no such payment could be *compelled,* although under Civil Practice Act, section 792, the delivery of tangible personal property may be compelled. . . ."

At page 321 the Court continues:

> ". . . The proceedings below have gone on the erroneous theory that the entire indebtedness of the bank to its depositor is a tangible asset of the judgment debtor capable of delivery *in specie* to the receiver and subject to the provisions of the last sentence of General Corporation Law, section 170, which provides for the delivery of such property to the receiver. But the payment of debts must be kept distinct from the delivery of property (Civ. Prac. Act, sections 792, 793) and it appears that the bank never held any tangible property of the insolvent corporation which was capable of physical delivery but was merely indebted to it, subject to the injunction order. Moreover, all rights of property, if their

> recognition is resisted on substantial grounds, . . . must be determined by action and may not be enforced summarily. . . ."

In *Capital City Surety Co. v. DeLuxe Sightseeing Co.*, 233 N. Y. Supp. 126, the same rule is declared, where the Court states as follows:

> ". . . While money on deposit in a bank is commonly considered to be the property of the depositor, the relationship in fact between him and the bank is that of debtor and creditor, and the amount on deposit represents merely an indebtedness by the bank to the depositor. For this reason the provisions of Section 793, Civil Practice Act, requiring delivery of money to the sheriff, where the same belongs to a debtor, but is in the possession of a third party, do not apply and cannot be availed of here. Nor, within the wording of said section, is the money on deposit money belonging to the judgment debtor. . . ."

Under the foregoing principles, therefore, it is manifest that the Court erred in requiring Coffman to pay any sum of money whatsoever to Cobra.

Finally, the very form of the Order made by the District Court requiring Coffman to pay to Cobra the amount of Cobra's judgment against Aircraft Company is erroneous. By the terms of the Order ". . . Harry J. Coffman is ordered to pay to the judgment creditor Cobra Manufacturing Company the sum of $6,254.25 . . ." [R. 124-125]. Such order is an *in personam* order which the law forbids where there is absent the requisite proof of possession of property belonging to the

judgment creditor. To permit such an order would be to subject appellant to imprisonment for an alleged debt contrary to constitutional and statutory enactment.

> *Knutte v. Superior Court,* 134 Cal. 660, 66 Pac. 875.

Conclusion.

We believe that we have demonstrated in this Brief that the Order appealed from should be reversed. That Order rests upon proceedings had before a Special Master upon a judgment either void for want of jurisdiction or unenforceable because it lacked the attributes of a money judgment. The proceedings before the Special Master were not supported by the evidence but were contrary thereto. In adopting the reports of the Special Master and his Findings and Conclusions the trial court made an order against appellant which is against the law both in its substantive and procedural aspects.

Upon the principles, precedents and authorities herein set forth, therefore, it is respectfully submitted that the Order appealed from be reversed.

Reynolds, Painter & Cherniss,

By Louis Miller,

Attorneys for Appellant.

APPENDIX.

California Code of Civil Procedure, Section 717, provides as follows:

> "After the issuing or return of an execution against property of the judgment debtor, or of any one of the several debtors in the same judgment, and upon proof by affidavit or otherwise, to the satisfaction of the judgment, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars ($50), the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same."

California Code of Civil Procedure, Section 719, provides as follows:

> "The judge or referee may order any property of the judgment debtor, not exempt from execution, in the hands of such debtor, or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment; but no such order can be made as to money or property in the hands of any other person or claimed to be due from him to the judgment debtor, if such person claims an interest in the property adverse to the judgment debtor or denies the debt."

California Code of Civil Procedure, Section 720, provides as follows:

> "If it appears that a person or corporation alleged to have property of the judgment debtor, or to be

> indebted to him, claims an interest in the property adverse to him, or denies the debt, the judgment creditor may maintain an action against such person or corporation for the recovery of such interest or debt; and the judge or referee may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such orders may be modified or vacated by the judge or referee granting the same, or the court in which the action is brought, at any time, upon such terms as may be just."

California Code of Civil Procedure, Section 684, provides as follows:

> "When the judgment is for money, the same may be enforced by a writ of execution. . . ."

No. 13672.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY J. COFFMAN,

Appellant,

vs.

COBRA MANUFACTURING COMPANY,

Appellee.

ANSWERING BRIEF OF APPELLEE.

FILED

JUL 20 1953

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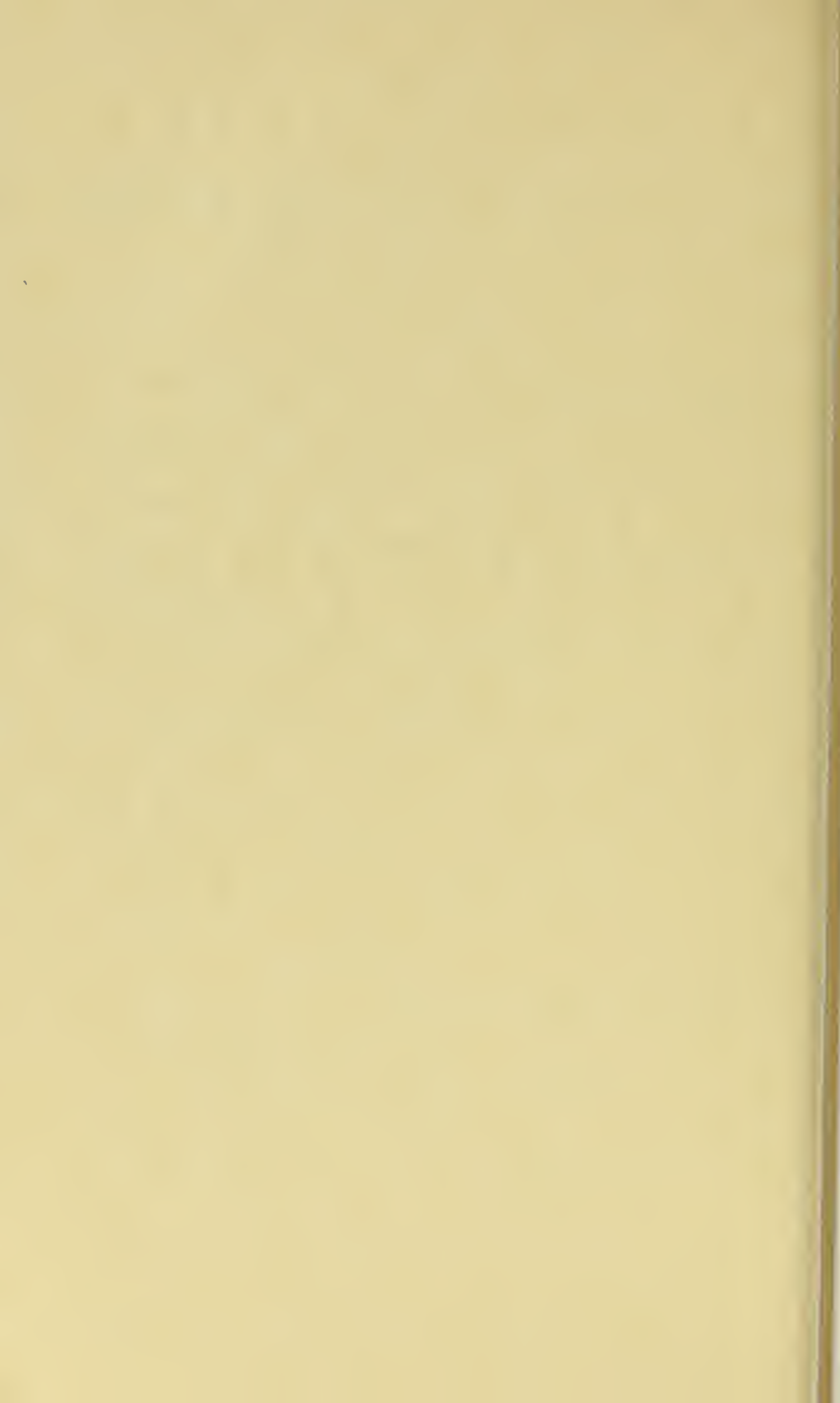

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Ballantine and Sterling's California Corporations Code (1949 Ed.), par. 151, pp. 210-211; par. 152, p. 211; par. 153, p. 213; par. 155, p. 215; par. 161, p. 219; par. 167, p. 229 31

10 California Jurisprudence, Sec. 96, p. 559 26

30 Corpus Juris Secundum, Sec. 599, p. 986 26

No. 13672.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Harry J. Coffman,

Appellant,

vs.

Cobra Manufacturing Company,

Appellee.

ANSWERING BRIEF OF APPELLEE.

Introductory Statement.

This is a supplemental proceeding in aid of judgment and execution under Rule 69 of the Federal Rules of Civil Procedure and Sections 714 to 721, inclusive, of the California Code of Civil Procedure which have been adopted by reference in Federal Rule 69 as the proper and appropriate procedure in aid of judgments and executions. Under Federal Rule 69(a) the local state law is the controlling rule as to both the substantive and procedural rights of the parties, as declared by the authorities cited in the footnote below.*

**Huddleston v. Dwyer*, 322 U. S. 232, 64 S. Ct. 1015, 88 L. Ed. 1246; *De Foe v. Town of Rutherfordton* (C. C. A. 4), 122 F. 2d 342; *Schram v. Carlucci* (D. C. Mich.), 41 Fed. Supp. 36; *Keering v. Wishnefsky* (N. Y.), 52 Fed. Supp. 625, affirmed in 142 F. 2d 1005; *Fidelity Union Trust Co. v. Field,* 61 S. Ct. 176, 311 U. S. 169, 85 L. Ed. 109; *Capital Co. v. Fox,* 85 F. 2d 97, 106 A. L. R. 376; *Ex parte Boyd,* 105 U. S. 647, 26 L. Ed. 1200; *Schram v. Spivack,* 68 Fed. Supp. 451.

Supplementary proceedings are a substitute for creditors' bills as formerly used in Chancery, and they are equitable in nature.

> *Herrlich v. Kaufman,* 99 Cal. 271;
> *Travis Glass Co. v. Ibbetson,* 186 Cal. 724;
> *Philips v. Price,* 153 Cal. 146;
> *Parker v. Page,* 38 Cal. 522;
> *McClutcheon v. Superior Court,* 134 Cal. App. 5;
> *Tucker v. Fontes,* 70 Cal. App. 2d 768;
> *Medical Finance Assn. v. Karnes,* 32 Cal. App. 2d 767;
> *Bunnell v. Winns,* 13 Cal. App. 2d 114;
> *Finch v. Finch,* 12 Cal. App. 274.

The Special Master who conducted the examination in the instant supplementary proceeding was the trier of the factual issues, and unless clearly erroneous his findings are binding on the reviewing court. As stated in the leading case of *Parker v. Page,* 38 Cal. 522, the California Supreme Court in construing Section 244, the predecessor of Section 719 of the present Code of Civil Procedure, declared at page 525 as follows:

> ". . . Counsel for the garnishee insist that, under Section 244, when it is alleged that the garnishee is indebted to the judgment debtor, or has in his hands property belonging to him, if the fact is denied, the only order which the Court can properly make is one authorizing the judgment creditor to institute an action against the garnishee, in order to adjudicate the disputed fact in a proceeding having all the necessary parties before the Court. *This is undoubtedly true, if the denial be made in good faith.*

The obvious purpose of Section 244 was to entitle the garnishee, *who in good faith*, denied that he had any property of the judgment debtor, or was in any wise indebted to him, to the benefit of a trial in a regular action with the proper parties, and before a jury in a proper case. . . . It may be that the referee deemed the testimony of the garnishee on this point so evasive as to discredit it; and when it is evident that the garnishee is acting *in bad faith in denying his indebtedness to the judgment debtor, and makes the denial only in form and for purposes of vexation and delay, the referee may* TREAT IT AS FRAUDULENT, AND DISREGARD IT. *The denial of the debt or the adverse claim to the property, contemplated in Section 244, is a claim or denial in good faith, and not a mere fraudulent sham, resorted to for purposes of delay.* To permit a fraudulent garnishee for the mere purpose of delay, and who, evidently, is acting in bad faith, to avail himself of Section 244, in order to drive the judgment creditor to an action against him, would be to pervert the true purpose of that section, and make it a shield for fraud, instead of an instrument of justice." (Emphasis ours.)

In the recent case of *Heath v. Helmick,* 173 F. 2d 157, this Court stated as follows:

"The badges of fraud with relation to creditors were early marked in the English mercantile community. Because of the pattern which such action took, the more notorious were denounced in the earliest enactments culminating in the statutes of Elizabeth. In general, as here action of a debtor attempting to defraud creditors will be found catalogued and indexed in Coke in what has been called his restatement of the law. Twyne's Case is a classic

> which delineates many devious devices. These medieval authorities are not cited as binding precedents, but to show that the propensities of the human heart bent on fraud are almost standard. Yesterday, today, and tomorrow, the same tortuous trail can be followed by the same blazes." (At pp. 160-161.)
>
> "There is a suggestion that the referee was not justified in finding fraud. It is said that, whether the inference can be drawn from certain evidence is a question of law. But the trier of fact, who sees the witnesses is free to disbelieve them even if there is no flat contradiction. . . . In any event, this court would be constrained to support the findings of a referee who saw the witnesses, where these are fully supported by the record and are concurred in by the trial court on review." (At pp. 161-162.)

Appellee, Cobra Manufacturing Company, is a California corporation and is the judgment creditor of the California Aircraft Engineering Company, a corporation, and appellant Harry J. Coffman was the majority stockholder, director, president, and the sole manager of the debtor corporation, during the period in question. For sake of brevity the judgment creditor is called herein COBRA and the judgment debtor is called AIRCRAFT.

Nature of Action.

The present controversy between Cobra and appellant Coffman arises out of the bankruptcy matter initiated by Cobra in the court below by filing a petition under Chapter XI of the Bankruptcy Act which resulted in the judgment in favor of Cobra against Aircraft in the sum of $6,254.25.

Prejudgment Proceedings in the Bankruptcy Matter.

The following proceedings relevant on this appeal were had in said bankruptcy matter:

1. Cobra's petition for arrangement under Chapter XI of the Bankruptcy Act was filed in March, 1946, and thereupon the matter was referred to Honorable Hugh L. Dickson, one of the referees in bankruptcy of the District Court for the Southern District of California, Central Division.

2. Aircraft, a creditor of Cobra, made and filed in said bankruptcy matter a verified proof of claim against Cobra in the sum of $1,868.16, which claim was objected to by Cobra, and Cobra thereupon filed a counterclaim and set-off against Aircraft in the sum of $6,254.25. The respective claims of the parties involved mutual debts and credits under Section 68 of the Bankruptcy Act, based on their mutual transactions from May 7, 1945, and April 16, 1946 [R. p. 5].

3. There was a hearing before the Referee on the merits on said mutual debts and credits to which no objection was interposed either by Aircraft or appellant Coffman. At the conclusion of the hearing the Referee made findings of fact and conclusions of law and signed an order awarding to Cobra its set-off in the sum of $6,254.25. The order, signed and filed by the Referee on May 20, 1947, was affirmed by the District Judge on Aircraft's petition for review under Section 39(c) of the Bankruptcy Act on November 5, 1947.

4. The aforesaid order of the District Judge was entered in the Civil Docket of the court in Book 46 of Judgments, at page 696 [R. p. 4]. No motion for relief from said judgment was ever made either by Aircraft or

Coffman under Rule 60 of the Federal Rules of Civil Procedure; nor was said judgment appealed from, and the judgment was final.

5. The bankruptcy matter was closed on September 14, 1948, and an order was entered by the Referee closing said bankruptcy matter and the revesting of all of the remaining assets in Cobra, which included the aforesaid judgment [R. p. 24].

6. On the basis of said judgment an execution was issued on July 6, 1950, against Aircraft [R. pp. 25-26], which was returned unsatisfied on September 12, 1950 [R. p. 27].

Proceedings After Entry of Judgment.

Based on the affidavit of Cobra made pursuant to Section 715 of the California Code of Civil Procedure, an order was made by the District Judge directing Aircraft and Coffman to submit to an examination relating to the disposition and disappearance of Aircraft's property and assets, and appointing and directing the Honorable Howard V. Calverley, the United States Commissioner of the Federal District Court, as Special Master to conduct said examination, and to make findings of fact and conclusions of law in respect thereto. The order further provided as follows:

> "That the powers of said Special Master shall be coextensive with the powers of this Court, as if the examination was had by this Court. . . . That said Master shall have all such powers as are conferred on Masters by the rules of Civil Procedure for the District Courts of the United States."

Said order was duly served on Aircraft and Coffman and in response thereto Coffman appeared before the

Master on August 10, 1950, and at his request the examination was continued to August 24, 1950, in order to enable him to obtain counsel to represent him at the examination. Several hearings were thereafter had before the Master, at which Coffman was represented by counsel. The matter was heard on the merits without an objection being interposed by Coffman or his counsel. The hearing was concluded on June 28, 1951 [R. p. 48]. On October 16, 1951, the Special Master filed his report and findings in which he found as a fact that Coffman was the controlling stockholder, director and president of Aircraft during the period in question, and that he had misappropriated the Aircraft funds in fraud of Aircraft's creditors. The Master found as a fact that said misappropriation by Coffman took place between May 1, 1945, to and including June 30, 1948, that said misappropriation was wrongful, and in breach of his trust, that Coffman did thereby cause the financial inability of Aircraft to pay the aforesaid judgment, and that Coffman was indebted to Aircraft in the sum of $9,240.46. The Master further found:

> "Harry J. Coffman does not deny, *in good faith,* that he is in debt to the California Aircraft Engineering Company, a California corporation, in the sum of $9,240.46. . . . the Master concludes that either upon the theory of debt, or breach of a constructive trust, which theories are not mutually exclusive, Harry J. Coffman should be ordered by the District Court to pay to the Cobra Manufacturing Company, a corporation, the sum of $6,254.25, the amount of the judgment which the Cobra Manufacturing Company has obtained against the California Aircraft Engineering Company, together with interest at the rate of 6% from the date of judgment, namely, November 5, 1947, and costs."

Said report was excepted to by Coffman, and upon the hearing of his exceptions, and on Coffman's application, a *stipulated order of re-reference* was made and entered by the District Judge to the Master for a factual finding and conclusion of law in respect to Coffman's claimed offset against Aircraft in the sum of $12,207.39. At said hearing Coffman admitted that he was indebted to Aircraft in the sum of $9,240.46, but claimed he was entitled to an offset in the sum of $12,207.39.

Pursuant to said order of re-reference the Master made a supplemental factual finding and a conclusion of law, and the Master found as a fact and as a matter of law that Coffman was not entitled to his said offset. The Master further found as a fact that Coffman's denial of his indebtedness to Aircraft *was not made in good faith.* In his said supplemental report the Master made additional subsidiary findings which present a cogent appraisal and analysis of all of the evidence, and conclusively demonstrated that Coffman's alleged offset was a mere bookkeeping entry, not entitled to credence [Supp. Report, R. beginning at p. 81].

Said supplemental report was excepted to by Coffman, and his exceptions were based on the sole ground that the Master's Subsidiary Findings were not supported by the evidence, no objection being interposed to the jurisdiction of the Master to make a factual finding on his alleged offset [R. p. 96].

A minute order was entered by the District Judge on August 14, 1952, adopting and approving the Master's original and supplemental reports, and ordering the parties to submit a formal order to this effect [R. p. 102].

Thereafter, on August 22, 1952, Coffman filed a motion for leave to reargue his aforesaid objections and to have the Court reconsider its ruling. Said motion was based on the sole ground that Coffman was entitled to his aforesaid offset against Aircraft in amount $12,-207.39, that the Master's factual finding on this issue was erroneous, *and that for this reason* the *Master was divested of jurisdiction to hear the matter* [R. 103, 104]. Said motion was denied by the District Judge on September 8, 1952 [R. p. 119].

Following the denial of said motion, a written formal order was signed and filed by the District Judge on October 27, 1952, adopting and approving the Master's original and supplemental reports and overruling Coffman's exceptions. The order made the finding that Coffman was the majority stockholder, director and president of Aircraft, and that:

> "II. Pursuant to the recommendation of the Special Master, which is adopted and accepted by the Court and in accordance with the provisions of Section 719 of the California Code of Civil Procedure, which has been adopted by reference in Rule 69(a) of the Federal Rules of Civil Procedure, Harry J. Coffman is ordered to pay to the judgment creditor, Cobra Manufacturing Company, the sum of $6,-254.25, the amount of the judgment which the Cobra Manufacturing Company has obtained against the California Aircraft Engineering Co., the judgment debtor herein, on November 5, 1947, entered in Book 46 of Judgments of this Court at page 696, together with interest at the rate of 6% from November 5, 1947, and costs. (Costs taxed at $221.43.)" [R. 123.]

Jurisdictional Statement.

I. The jurisdiction of the District Court is based on the following:

(1) Section 68 of the Bankruptcy Act provides that, "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

(2) Under Rule 54 of the Federal Rules of Civil Procedure "judgment" includes "a decree and any *order* from which an appeal lies."

(3) Rule 79 of the Federal Rules of Civil Procedure provides for the keeping by the Clerk of a civil docket, and requires the Clerk to make entries therein of judgments *and appealable orders.*

(4) Under Rule 60 of the Federal Rules of Civil Procedure the Court may relieve a party from a final judgment, *order,* or proceeding, provided that a motion therefor is made within a reasonable time.

(5) Rule 53 of the Federal Rules of Civil Procedure provides for the appointment of masters and prescribes their duties and powers, and requires him to make findings of fact and conclusions of law if the order of reference so states. It also provides that an "Application to the court for action upon the report *and upon objections* thereto shall be by motion, etc."

(6) Rule 69 of the Federal Rules of Civil Procedure covers supplementary proceedings in aid of judgment and executions, and provides that such proceedings shall be "in accordance with the practice and procedure of the state in which the district court is held."

(7) Section 719 of the California Code of Civil Procedure (adopted by reference in said Rule 69(a)), reads as follows:

> "The judge, justice, or referee may order any property of the judgment debtor, not exempt from execution, in the hands of such debtor, *or any other person,* or due to the judgment debtor, to be applied toward the satisfaction of the judgment; but no such order can be made as to money or property in the hands of any other person or claimed to be due from him to the judgment debtor, *if such person claims an interest in the property adverse to the judgment debtor or denies the debt.*" (Emphasis supplied.)

II. Jurisdiction of this court is based upon the following:

(1) Section 24 of the Bankruptcy Act provides that courts of appeals of the United States have appellate jurisdiction in proceedings in bankruptcy.

(2) 28 United States Code, Section 1291, provides that the courts of appeal have jurisdiction on appeals from *final decisions* of the District Courts of the United States.

III. The pleadings necessary to show the existence of jurisdiction consist of the following records:

(a) Cobra's petition for arrangement under Chapter XI of the Bankruptcy Act, and the order of reference to the Referee [R. p. 3].

(b) The Referee's findings and order awarding Cobra $6,254.25 [R. p. 7] and the judgment of the District Judge affirming said findings and order [R. p. 4].

(c) Execution against Aircraft and the return by marshal of *nulla bona* [R. p. 7].

(d) The orders of the District Judge directing Coffman's examination, and appointing and directing the Master to conduct Coffman's examination, and to make findings of fact and conclusions of law [R. pp. 30, 31].

(e) Master's original and supplemental reports [R. pp. 47, 80].

(f) Order of District Judge adopting and approving the Master's original and supplemental reports [R. p. 123].

IV. The facts disclosing the basis of the jurisdiction of the District Court and of this Court on appeal are set forth in the Master's original and supplemental reports, adopted and approved by the District Judge.

Appellee's Statement of the Case.

It is to be regretted that appellant's version of the factual situation is faulty and slanted, and is based on fragmentary portions of Coffman's oral testimony, which was inherently improbable and unrealistic and impeached by the documentary evidence, and which the Master rejected as fantastic and in collision with the truth.

We respectfully submit that the truth of the factual situation, stripped from appellant's labored and strained inconsistencies, is fairly depicted in the Master's original and supplemental reports. We beg leave to adopt said reports as the appellee's statement of the case, with the following additions:

I.

Bearing on the incredibility of Coffman's oral testimony in regard to the transfer of his stock to a man under the name of E. F. Brown, the following from his testimony is worthy of note:

(1) On pages 132 and 139 his testimony was (a) that "I *gave* him my stock when he was—when he came in and took charge of it."—"I sold him by stock"; (b) that no record of the transfer was made on the corporate records, and (c) *that the stock was not transferred to Brown, and "the stock remained in my name."*

(2) On pages 133 and 134 his testimony was that he *"handed"* his stock to Brown, but the stock has remained in his name since January 17, 1945.

(3) On pages 147 to 153 he again testified that he *"gave"* his stock to Brown, and that he did at the same time resign as President and Director of the Company, which was *in the latter part of 1945 or in the latter part of 1946.* It is an undisputed fact that the claimed resignation was not recorded on the records of the Company. The exhibits show that Coffman, his wife and his attorney, Rollinson, were at all times the only directors and officers of the Company.

(4) On pages 159 to 166 Coffman's testimony was that he did not at any time deliver his stock to Brown, but he had deposited 100 shares of his 150 shares with his auditor, Mapes (since deceased), and said deposit with Mapes *was to become effective as if, and when Brown had accumulated sufficient working capital.* Coffman further testified that he did not know when the transfer became effective, that he (Coffman) was connected with the Company as late as September, 1946, that Brown did not put any of his own money into the Company, and that Brown had been somewhere in the east for the past several years.

(5) On page 237 Coffman again admitted that the stock was at no time transferred to Brown.

(6) It was admitted by Coffman that Brown's name nowhere appeared in the corporate records either as a stockholder, or as an officer, or director. The fact that Coffman was at all times the majority stockholder, president and director of the Company was established by the documentary evidence, which under Sections 1829 and 1837 of the California Code of Civil Procedure, constitutes the best evidence.

The Master's subsidiary finding in respect to the alleged transfer of his stock appears on page 86 of the record, which is as follows:

> "The vague and uncertain explanation of this transfer of stock in the Aircraft Company and Coffman's resignation from the board of directors is entirely uncorroborated and is directly contradicted by the record evidence heretofore referred to as well as by the conduct of Coffman in retaining control over the affairs of the Aircraft Company. Even assuming that some transaction of the character described by Coffman had taken place, in the opinion of the master, it would not constitute a bona fide transfer of Coffman's stock in the corporation. At most it could be considered as a contemplated transfer of stock which the records of the corporation show did not take place. The testimony of Coffman in this respect lacks credibility and cannot be accepted by the master in giving the legal effect that Coffman ascribes to it. For the foregoing reasons, the master found in his original Findings that Coffman is the dominant and controlling stockholder of the Aircraft Company as well as its president."

II.

Bearing on the lack of the integrity of Coffman's books of account (which are before this court as an exhibit), and bearing specifically on the integrity of the bookkeeping entries therein covering his alleged loans and advances to the Company on which he predicates his offset against the Company, the following may be noted:

(1) When he was interrogated as to the sources of his finances Coffman testified: (a) that he did not know what his annual income was; and (b) that he believed that he had a personal bank account in the Hollywood State Bank and the Bank of America, but he did not know the amount—whether it was $100.00, or a thousand dollars, or as high as fifteen thousand dollars.

The record shows that his individual records were not produced by him in response to the subpoena which was served on him prior to the hearing, and he did not make an effort at any time to locate said records. Coffman further testified that *"If I did have such records* they have long since been disposed of" and that he believed that he had no records of his individual bank account [R. pp. 224-233].

(2) On page 219 Coffman testified that he was a stockholder of Douglas Oil and Sales Company, and on page 223 he testified that no such corporation was in existence, and that he was not a stockholder thereof [See also Ex. 8, which was admitted in evidence without objection].

(3) On page 224 Coffman testified that he was a director of a corporation under the name of Wings, Incorporated, and on page 254 he testified that the Wings company was a partnership consisting of his daughter

and two other parties, and that he had no financial interest in said partnership.

(4) When he was further interrogated as to the sources of his finances, Coffman stated "I would have to look up the records" [R. p. 224]. As heretofore pointed out, his testimony was that all of his records, *if he had any,* had been disposed of.

The master's subsidiary finding on this issue appears on pages 91-93 of the Record, which was as follows:

> "In connection with the account of H. J. Coffman dba Nash Wilshire on the books of the Aircraft Company, No. 99-6, referred to as Exhibit B attached to Coffman's exceptions to the original report and findings of the master, the master found in his original report and findings that Coffman did not deny his indebtedness to the Aircraft Company in the sum of $9,240.46 in good faith and has heretofore made a supplemental finding to the effect that Coffman is not a creditor of the Aircraft Company in the sum of $12,207.39 as would appear from said account. As was previously stated, the master has made these findings for the reason that the account lacks integrity. For instance, the account contains many payroll entries in 1946, a time long after the Aircraft Co. ceased active business. It is difficult to see how these items could be charged legitimately against the Aircraft Company. In addition there is the entry of December 31, 1946, concerning 'Bldg. Arts Center.' This enterprise had no connection with the Aircraft Company, nor did American Vendors, an enterprise in which Coffman was privately interested.
>
> There also appears an entry in said account of October 31, 1947, showing a credit to Coffman in

a substantial amount, which is actually a transfer of 'Wings, Inc., Inter-Company Account,' which account is numbered 99-1 in the ledger of the Aircraft Company. 'Wings, Inc.,' was not a corporation, but a partnership in which Coffman's daughter had a one-third interest [Tr., Vol. 2, pp. 11-12].

In view of the foregoing discrepancies, the master could not in good conscience place reliance on the ancount submitted by Coffman as an off-set. This view is further substantiated by the testimony of Albert Boris Silverman, public accountant [Tr., Vol. 2, p. 22], to the effect that the records of the Aircraft Company show that the Aircraft Company had been paying Coffman's bills as submitted by him to it.

Assuming that the items contained in Exhibit B are legitimate items, the master is of the opinion that under the decision of Pepper v. Litton, *supra,* and other cases cited, Coffman, as president, director and dominant stockholder of the Aircraft Company, may not claim an off-set against property held by him in trust and which he had misappropriated. To permit him to do so would be to allow Coffman to place himself in the position of a preferred creditor of the Aircraft Company, a practice specifically condemned in the cases cited."

III.

Bearing on Coffman's assertion that he had an interest in the lease covering Aircraft's business place, it should be noted that Coffman's testimony was as follows:

(a) That he signed the lease as an endorser because the landlord made him "go on the lease";

(b) *That the lease was the property of the Corporation;* and,

(c) That the lease was not assigned to him by the Corporation.

Bearing on Coffman's assertion that the property of the corporation was remodeled with his own money, and that it was remodeled in order to enable Aircraft to conduct thereat its corporate business, reference is made to the following subsidiary finding of the master, appearing on page 88:

> "At the time Coffman opened the Nash Wilshire agency, he expended approximately $6,123.76, at least part of which Coffman admitted belonged to the Aircraft Company in renovating the leased premises occupied by the Aircraft Company in order that the premises might be used as an automobile show room for Nash Wilshire, Coffman's personally owned business."

IV.

Without elaborating further on the fictional character of Coffman's offset (which was the central issue involved in the proceeding before the master) it suffices to point up the fact that the subject of his claimed offset was advanced by Coffman for the first time about four months after the proofs had closed, and that this claim was advanced not by sworn testimony, but by an *ex parte* communication [R. p. 39].

As stated by the master in his original report at pages 51 and 52:

> "The master has considered all of the evidence in this matter and has studied the arguments presented by both Cobra and Coffman. It is not considered

appropriate to unduly prolong this report by attempting to set forth an analysis of the evidence presented. The master is of the opinion that the evidence supports the contentions of Cobra, the judgment-creditor. The denial of the debt advanced by Coffman *for the first time in his Memorandum Brief* is not believed to be in good faith, but is urged as an afterthought, no evidence on the point having been offered by Coffman at any of the hearings in spite of notice to the effect that Cobra intended to offer evidence to the effect that Coffman was indebted to the Aircraft Company."

Summary of the Evidence.

In brief summary, the documentary evidence and the realities of the factual situation establish the following facts:

1. That Aircraft was a wartime Aircraft Corporation engaged in war work under contracts with the United States Army; and since the early part of 1945 the corporation was at all times a family corporation consisting of Coffman and his wife and daughter.

2. That Coffman was not only the majority stockholder and president of the corporation, but he was factually and realistically in full and unlimited charge of its business operations, property and assets; and the alleged transfer of his stock to Brown lacks substantiality.

3. That upon the termination of the war hostilities with Germany in the early part of 1945, the operations of the corporation were slowed down, and upon the subsequent termination of the war hostilities with Japan in

August, 1945, the operations of the corporations were stopped completely, and *in October, 1945,* the war business of the corporation was closed for all practical purposes.

4. That Aircraft's net worth in October, 1945, was in excess of $20,000.00, and Cobra at said time was a creditor of the corporation.

5. That Aircraft was not dissolved; and without notice to Cobra, its assets were transferred in October, 1945, by Coffman to his new personally conducted venture, the Nash-Wilshire.

6. That Aircraft's property was used by Coffman in connection with his Nash-Wilshire business and over $6,000.00 in cash was withdrawn by him from Aircraft's funds, commencing with October, 1945, and same were used by him in the conversion of the Aircraft's plant into a building suitable to his Nash-Wilshire business.

7. That Aircraft's moneys, property and assets were later commingled by Coffman with some other assets which the Nash-Wilshire acquired since October, 1945, and by and through Coffman's use of Aircraft's assets, the Nash-Wilshire realized substantial profits, its net worth in 1948 having reached a sum much in excess of $100,000.00.

8. That in addition thereto, over $9,000.00 was withdrawn by Coffman from Aircraft's funds October, 1945, and June, 1948.

ARGUMENT.

Appellee prefaces its reply to appellant's several contentions with these preliminary observations:

I.

Under the modern law, established by the decisions since the decision of the United States Supreme Court in *Alexander v. Hillman* (296 U. S. 222, 56 S. Ct. 204, 80 L. Ed. 192) was handed down, the referee had the jurisdiction and power to make and enter the *affirmative* order on Cobra's set-off under Section 68 of the Bankruptcy Act, and the order of the referee [R. pp. 5-11] was valid and enforceable. Moreover, no motion to vacate said order was made by Aircraft or Coffman pursuant to Rule 60 of the Federal Rules of Civil Procedure. Also, this point was at no time raised in the court below, either in the bankruptcy proceeding or in this proceeding. It is raised by the appellant for the first time on this appeal, and it is not open for review.

II.

Bankruptcy courts have equitable jurisdiction and legalistic formalism is not required in the framing of their orders and decrees. It is sufficient that the order of the bankruptcy court should adjust the relief sought in a manner that is just and equitable and affords protection to the rights of the parties, and finally determines the rights and claims of the parties relating to the subject matter involved. The order of the referee was based on Section 68 of the Bankruptcy Act, and it did finally determine and adjudicate the rights of the parties. This order was an appealable order and was a judgment under Rules 54 and 79 of the Federal Rules of Civil Procedure and under the California Code of Civil Pro-

cedure. The contrary contention of the appellant was not raised by him either in the bankruptcy proceeding, or in the instant proceeding. It is raised by him for the first time on this appeal, and same is not open for review.

III.

The contention of the appellant that the order of the referee was not a valid and enforceable judgment, likewise was not raised in the appellant's exceptions to the master's original and supplemental reports as required by Rule 53 of the Federal Rules of Civil Procedure. For this further reason appellant's contention is not open for review.

IV.

It was stipulated by the parties in open court [see Order of Re-reference, p. 77] that the issues before the master were limited to a determination of the factual and legal validity of appellant's asserted offset, and the jurisdiction of the master to make an adjudication of this issue was not challenged by the appellant in his exceptions to the master's supplemental report [R. p. 96].

V.

It was admitted by appellant at the hearing of his exceptions to the original report of the master that he was in fact indebted to Aircraft in the sum of $9,240.46, same representing his withdrawals from Aircraft as found by the master. The master's factual finding that appellant was not entitled to his offset and that the denial of his indebtedness in the aforesaid sum of $9,240.46 was not made by him in good faith, is based on substantial evidence. Under Section 719 of the California Code

of Civil Procedure the master, as trier of the facts, had jurisdiction and power to pass upon the bona fides of appellant's offset, and his finding is binding on this court. The master's finding was also concurred in by the district judge.

VI.

Cobra's claim against Coffman was based on the Fraudulent Instruments and Transfers Act, Sections 3429 to 3439.11 inclusive of the Civil Code of the State of California. It cannot be denied that Aircraft was Cobra's debtor within the meaning of Section 3429, Civil Code; that Cobra was a creditor of Aircraft within Sections 3430 and 3439.07, Civil Code; that Aircraft ceased to do business in the summer of 1945, at which time Cobra was a present as well as a future creditor of Aircraft within the meaning of Section 3439.06, Civil Code; that in October, 1945, Aircraft had assets in the approximate amount of $20,000.00 and said assets were taken over by Coffman without payment therefor and Aircraft was thereby rendered insolvent; that Coffman's misappropriation of Aircraft's assets was a fraud on Cobra within the meaning of Sections 3439.04 and 3439.05 of the Civil Code; that Coffman, as the dominant stockholder, director and president of Aircraft, held the Aircraft's assets in trust for the benefit of Aircraft's creditors, had no legal or equitable right to misappropriate said assets for his own benefit in fraud of Aircraft's creditors.

All of the foregoing facts were conclusively established by the documentary evidence and as stated by this Court in *Heath v. Helmick,* 173 F. 2d 157, "it should have been error for the referee to have found otherwise."

I.

The Order of the Referee Under Section 68 of the Bankruptcy Act Affirmed by the District Judge Under Section 39(C) of the Bankruptcy Act Made a Final Binding Determination of the Rights and Claims of the Parties. It Is a Valid Judgment in Equity for the Payment of Money in a Definite Amount Which Is Enforceable by Execution.

A.

In support of his contention that the referee was without jurisdiction to render an affirmative judgment on Cobra's counterclaim and set-off, counsel for appellant cites, on page 14 of his brief, three early decisions rendered by the District Court of California prior to the adoption of the Federal Rules of Civil Procedure. It is evident that counsel for appellant did not study the law on this subject, and failed to note that the law laid down in these three early decisions has been rejected as unsound in the recent decisions rendered after the adoption of the Federal Rules of Civil Procedure. The recent cases on this subject are:

Florence v. Kresge (C. A. 4), 93 F. 2d 784;

In re Solar Manufacturing Co. (C. A. 3), 200 F. 2d 327;

Floro Realty Co. v. Stem Electric Co. (C. A. 8), 128 F. 2d 338;

Griffin v. Vought (C. A. 2), 175 F. 2d 186;

Columbia Foundry v. Lochner (C. A. 4), 179 F. 2d 630;

In re Nathan (D. C. Cal), 98 Fed. Supp. 686.

We direct specific attention to the *Nathan* case (98 Fed. Supp. 686) in which Judge Mathes in his opinion

rendered on June 28, 1951, made a scholarly and illuminating exposition of the law on this subject, and also to the opinion of the Third Circuit in *In re Solar Manufacturing Co.* (200 F. 2d 327) wherein the Appellate Court for the Third Circuit has approved the decision of Judge Mathes. For the benefit of the Court we cite *in extenso* from the *Nathan* case and from the *Solar Manufacturing Co.* case in the appendix. See also the summary of the law laid down by Collier, which is set forth in full in the appendix.

It is now well settled that the referee had jurisdition to make the order. It is singular that these recent decisions are not cited in appellant's brief, albeit they were readily accessible. It is to be noted further that appellant's present contention was not raised in the court below, either in the original bankruptcy proceedings, or in the instant supplementary proceeding, and it is raised for the first time by the appellant on this appeal.

B.

The order of the referee in question, affirmed by the district judge on appellant's petition for review under Section 39(c) of the Bankruptcy Act, made a final determination of the rights and claims of the parties. Said determination was *res adjudicata* (*In re Nathan, supra*) and constituted a judgment in equity under Rules 54 and 59 of the Federal Rules of Civil Procedure and under Section 577 of the California Code of Civil Procedure, which states that "A judgment is the final determination of the rights in an action or proceeding."

It constitutes a judgment also under Section 1060 of the California Code of Civil Procedure, which states

that "a declaration" made by the Court of the rights of the parties "shall have the force of a final judgment."

It requires no argument that archaic legalistic formalism in pleadings that was adhered to in Blacktone's era is not recognized at this date under the American system of jurisprudence. This is especially true in equity cases, and it is not required that the court frame its judgments and decrees in accord with legalistic formalism. It is sufficient that the judgment makes a final determination of the rights and claims of the parties.

30 C. J. S., Sec. 599, p. 986;

10 Cal. Jur., Sec. 96, p. 559.

A judgment is to be judged from its *substance,* rather than from its form, and it is a final judgment if it declares the rights of the parties in accordance with the findings of the court.

Hamilton Corp. v. Corum, 218 Cal. 92.

In support of his contention that the order of the referee in question did not constitute a judgment, appellant's counsel again relies on the case *In re Continental Producing Co.,* 261 Fed. 627 (App. Br. pp. 14, 15), which has been disapproved and rejected by the recent decisions; moreover the statement in said case (which appellant italicized and reading "The net result is that, though the finding of the referee with respect to the counterclaim of the trustee does not, in form, constitute a judgment against the creditor" was only a dictum.

Comments on Appellant's Other Citations.

Bank of America v. Standard Oil Co., 10 Cal. 2d 90, on page 15 of Appellant's Brief. In this case the Court ruled that no execution could issue for the reason that the judgment there *did not make a final determination of the parties, and for the further reason that the indebtedness due was not stated in a definite amount.* Such is not our case.

Wellborn v. Wellborn, 55 Cal. App. 2d 516, cited on page 16 of Appellant's Brief: This case involved an annulment of marriage and the Court stated that no execution could issue for the reason that *"there was no personal judgment for this amount, nor was there anything in the nature of a personal judgment."* This statement of the Court is omitted in Appellant's Brief.

Hennessey v. Puertas, 99 Cal. App. 2d 151, cited on pages 16 and 17 in Appellant's Brief: The judgment in that case provided that plaintiff was entitled to rents at the rate of $75.00 per month "subject to the terms of the lease." The judgment there was a qualified and conditional judgment, and not an unconditional judgment for payment of money in a definite amount such as due here.

McKay v. Coca-Cola Bottling Co., 110 Cal. App. 2d 672 (243 P. 2d 135), cited by appellant on page 17 of his brief. This case involved the enforcement of arbitration award and the judgment went no further than the approval of the arbitration award, and as stated by the Court on page 677 of its opinion, "It is thus clear that

the money due could not be determined from the judgment."

We respectfully submit that appellant's citations have not the remotest application to the case at bar. In the case at bar the order of the referee made a final determination of the rights and claims of the parties, and the indebtedness therein, from Aircraft to Cobra, was in the definite amount of $6,254.25. [R. p. 11.] It is clear that the order of the referee constituted an absolute and unconditional judgment for payment of money in a definite amount, and it was enforceable by execution under Section 684 of the California Code of Civil Procedure.

> *Pirta v. Rosetar,* 205 Cal. 197, 200;
>
> *Asakian v. Dusenberry,* 15 Cal. App. 2d 55 (in which a writ of mandate was issued to compel the issuance of an execution);
>
> *Welch v. Reese,* 82 Cal. App. 27, 28.

In the *Pirta v. Rosctar* case (205 Cal. 197) the court stated at page 200 as follows:

> "Conceding the finality of said interlocutory decree, respondent nevertheless questions the sufficiency of the wording of the clause which finds due, owing and unpaid from respondent to appellant said sum of $9,840 to constitute a valid award. * * * In substance is decrees to appellant from respondent said sum * * * The form of the judgment is of no consequence so long as it may be ascertained therefrom what rights, if any, of the respective parties in the

action have been determined by the court. The test of its sufficiency must rest in its substance rather than its form." (Citing cases.)

See also the following from *Security Trust and Savings Bank v. So. Pac. R. R. Co.*, 6 Cal. App. 2d 585, 588-589:

"It is a well established principle of law that a court possesses inherent power to enforce its judgments. (Citing cases.) Section 128 of the Code of Civil Procedure provides in part: 'Every court shall have power . . .

" '4. To compel obedience to its judgments, orders and process . . . in an action or proceeding therein. . . . Every court has inherent power to enforce its judgments and decrees and to make such orders and issue such process as may be necessary to render them effective. . . . The power to enforce their decrees is necessarily incident to the jurisdiction of courts. Without such power, a decree would in many cases be useless. All courts have this power and must necessarily have it; otherwise they could not protect themselves from insult or enforce obedience to their process. Without it they would be utterly powerless."

It should be noted that this point was not raised by the appellant in the court below, either in the original bankruptcy proceedings or in the instant supplementary proceedings, and it is raised for the first time on appellant's present appeal.

II.

The Master Had Jurisdiction and Possessed Judicial Power to Make the Factual Determination That Coffman's Denial of His Indebtedness to Aircraft Was Fictitious and Was Not Made in Good Faith.

Appellant's contention that the master was bound to accept Coffman's incredible testimony at its face value, and to ignore the realities of the factual situation, and all of the documentary evidence, is clearly without merit.

We respectfully invite the Court's attention to the case of *Parker v. Page,* 38 Cal. 522, referred to in the forepart of this brief, which case we respectfully submit, is a conclusive answer to appellant's contention.

It is respectfully submitted that the master's supplemental report clearly indicates that he has taken into consideration all of the evidence, including all of the documentary evidence, offered by the parties, and that he has taken exceptional pains to make a careful examination of all of the entries contained in the books of account of the Aircraft Company. We respectfully submit that on the basis of the evidence, the Master was justified in stamping Coffman's conduct as fraudulent, and that Coffman has in his possession the Aircraft's property, which he should turn over to Cobra pursuant to Section 719 of the California Code of Civil Procedure.

We respectfully submit that the Master was justified to make the following factual determination:

Under Rule 53(e)(2) of the Rules of Civil Procedure the master's findings are conclusive, unless clearly erroneous. (See cases cited in footnote below.)*

The factual findings of the master were also concurred in by the District judge. See *Heath v. Helmick,* 173 F. 2d 157, where this Court stated that the findings of the referee when concurred in by the trial court on review are binding on the appellate court, and that it would have been error for the trial judge to reject the master's findings on the facts therein involved, which we respectfully submit were for all practical purposes identical with the factual situation herein involved.

III.

Coffman Occupied a Fiduciary Relationship to Aircraft's Creditors and Was Bound to Act in the Utmost Good Faith.

In addition to the authorities cited in the appendix we submit the following authorities:

Hanson v. Cheynski, 180 Cal. 275, 285;

In re Los Angeles Lumber Products Co., 46 Fed. Supp. 77, 88;

California Corporations Code, Secs. 825, 826;

Ballantine and Sterling's California Corporations Code (1949 Ed.), par. 151, pp. 210, 211; par. 152, p. 211; par. 153, p. 213; par. 155, p. 215; par. 161, p. 219, and par. 167, p. 229.

**Arrow Distilleries, Inc.* (Michigan) *v. Arrow Distilleries, Inc.* (Illinois), 117 F. 2d 636, cert. den., 314 U. S. 633, 86 L. Ed. 508, 62 Sup. Ct. 67; *Stewart v. Ganey,* 116 F. 2d 1010; *Santa Cruz Oil Corp. v. Allbright-Nell Co.,* 115 F. 2d 604; *In re Connecticut Co.,* 107 F. 2d 734; *National Labor Relations Board v. Arcadia-Sunshine Co., Inc.,* 132 F. 2d 8; *Olds v. Rollins College,* 173 F. 2d 639; *In re Kelly,* 85 Fed. Supp. 316; *In re Kellett Aircraft Corporation,* 85 Fed. Supp. 525.

IV.

It Was Coffman's Statutory Duty to Have Aircraft Dissolved and to Pay Its Debts and Distribute Its Assets Upon the Termination of the War Under the California Corporations Code. In the Absence of Such Dissolution Coffman's Misappropriation of the Aircraft's Assets Was Wrongful, and He Held Same in Trust for Cobra.

In addition to the case of *Saracco Tank and Welding Co. v. Platz,* 65 Cal. App. 2d 306, quoted from *in extenso* in the appendix, see also Sections 4600 to 4619 of the California Corporations Code, which govern dissolution of corporations, and Section 4607 of the Corporations Code which requires that the distribution of the corporate assets be had under the supervision of the court. Sections 4608 to 4619 also prescribe the procedure for filing of claims by creditors against the corporation, and for the determination by the court.

This was not done by Coffman. It is clear that Coffman cannot, as a matter of fact and law, claim title to Aircraft's property, monies and assets, which the record shows amounted to over $20,000.00 in October of 1945. Nor did he have the legal or equitable right to withdraw from Aircraft's funds in excess of $9,000.00, which the master found Coffman had withdrawn from the treasury of the corporation between October, 1945, and June, 1948.

It is clear that pursuant to Section 719 of the California Code of Civil Procedure Cobra is entitled to an order ordering Coffman to pay over to Cobra the amount of its unpaid judgment, with interest and costs, and that such an order may be enforced pursuant to Section 721 of the Code of Civil Procedure.

In re Meyers, 46 Cal. App. 92.

V.

The Order Requiring Coffman to Make Restitution Was Proper.

This order, as above stated, conformed to Section 719 of the Code of Civil Procedure, and same is enforceable against Coffman personally under Section 721 of the Code of Civil Procedure. It is to be noted that Section 719 of the Code of Civil Procedure covers two situations: (1) When the property is in the possession of a third party, or (2) When the third party is indebted to the judgment debtor. Both said factual situations are present in this, case, either on the theory that Coffman is holding Aircraft's property in trust, or on the theory that he is indebted to Aircraft irrespective of a trust relationship for the reason that he had no right to misappropriate Aircraft's property without accounting for its proceeds and its disappearance under the Fraudulent and Transfers Act referred to in the forepart of this brief.

As stated in 12 American Jurisprudence, page 438:

> "Where an alleged contemner has voluntarily and contumaciously brought on himself disability to obey an order or decree he cannot avail himself of a plea of inability to obey as a defense to a charge of contempt."

See also Annotation in 120 A. L. R., page 704.

The case of *Farmers and Merchants Bank v. Bank of Italy*, 216 Cal. 452, cited by appellant on page 27 of his brief, has not the remotest application or relevancy to the present issue. The point under discussion was not even touched upon by the court. The holding of this case was only to the effect that the court would have no power

to order a third party to turn over his property to the judgment debtor under Section 719 of the California Code of Civil Procedure *if, as and when the third party denied his indebtedness in good faith.* Such is not the case here. The master found on substantial evidence that Coffman's denial of his indebtedness was not made in good faith, and that he, as trustee for Cobra, should account for the disposition of Aircraft's assets.

The case of *Knutte v. Superior Court,* 134 Cal. 660, 66 Pac. 875, cited by appellant on page 30 of his brief, involved the question whether the refusal by a tenant *to pay rent* subjected him to contempt. The court held that payment of rent constituted a debt, and that payment thereof is not enforceable by contempt. We fail to see the relevancy of this case.

Conclusion.

For sake of economy of space and time we confined our comments on appellant's brief to only a few of the appellant's inaccurate statements. We earnestly believe that the precise picture of the case, stripped from irrelevancies, is cogently presented in the master's findings which are abundantly supported by the record.

We respectfully submit that appellant's appeal is devoid of merit, and the order appealed from should be affirmed.

Ernest R. Utley and
Joseph B. Beckenstein,
Attorneys for Appellee.

APPENDIX.

In re Nathan, 98 Fed. Supp. 689, Judge Mathes stated:

"Divergent opinions have been expressed in both this and other circuits on the question of whether in summary proceedings upon the claim of a creditor, a bankruptcy court, Bankruptcy Act, Sec. 1(9), 11 U. S. C. A., Sec. 1(9), has jurisdiction to award affirmative relief upon the trustee's counterclaim for a preference received by a claimant. (Citing cases.) . . .

Generally speaking it is settled that 'A creditor who offers proof of his claim, and demands its allowance, subjects himself to the dominion of the court, and must abide the consequences.' (Citing cases.)

Thus the trustee at bar was entitled to assert any defenses against the claim, including a setoff based upon a preference received by the creditor; and the court have held that the bankruptcy court has jurisdiction summarily to adjudicate the merits of the alleged setoff.

The rationale of this holding is that 'One who has presented proof of debt had submitted his claim to the jurisdiction of the bankruptcy court, and must be deemed to have consented to the jurisdiction of that court to decide any defense that may be lawfully interposed.' (Citing cases.) . . .

So the ultimate question here is whether there exists rational basis to extend the rule of Alexander v. Hillman, *supra*, 296 U. S. 222, 56 S. Ct. 204, 80 L. Ed. 192, to imply consent for the bankruptcy court summarily to

adjudicate the counterclaim for a preference and, if proper, to render an affirmative judgment against the claimant thereon. . . .

I am of the opinion that there is rational basis for finding implied consent that the bankruptcy court exercise summary jurisdiction to adjudicate and render affirmative judgment on a counterclaim to recover a preference; and this result is reached by means of the traditional common-law technique of reasoning by analogy from recognized legal principles. . . .

Hence the bankruptcy court would be called upon to determine summarily the merits of the counterclaim as a defense or setoff to the claim. (Citing cases.) And such determination when final would be *res judicata* between the creditor and the trustee. (Citing cases.) . . .

The legal result being in substance the same as if actual consent had been given, there exists a rational and solid ground for holding that a creditor, by presenting his claim for examination and allowance, Bankruptcy Act, Sec. 57, 11 U. S. C. A., Sec. 93, impliedly consents to adjudication by the bankruptcy court in summary proceedings, Bankruptcy Act, Sec. 23b, 11 U. S. C. A., Sec. 46b, of not only the merits of the claim and of any defenses or setoffs thereto, see Giffin v. Vought, *supra,* 175 F. 2d at page 190, but also the merits of any counterclaim for affirmative judgment which the trustee may properly assert in response to the claim . . . (citing case).

In addition to the considerations of reason just discussed there are patent considerations of policy which also support extension of the rule of Alexander v. Hill-

man, *supra,* 296 U. S. 222, 56 S. Ct. 204, 80 L. Ed. 192, to bankruptcy proceedings.

The general policy of the Bankruptcy Act to effect 'quick and summary disposal of questions arising in the progress of the case, without regard to usual modes of trial attended by some necessary delay' Bailey v. Glover, 1874, 21 Wall. 342, 88 U. S. 342, 346, 22 L. Ed. 636, is supplemented by the provisions of Sec. 68, sub. a, 11 U. S. C. A., Sec. 108, sub. a, which in effect declare a statutory policy to settle all permissible claims or accounts 'between the estate of a bankrupt and a creditor.' (Citing cases.)

The provisions of Rule 41 of the Federal Rules of Civil Procedure, applicable in bankruptcy, clearly further such a policy. (Citing cases.)

Thus the same considerations of reason and policy which support the holding that filing of a claim gives consent of the creditor to adjudication of an affirmative judgment on equitable counterclaims in a plenary suit (citing cases), also support the holding that filing of a claim in bankruptcy gives the consent necessary to confer jurisdiction upon the bankruptcy court to adjudicate counterclaims for preferences, both legal and equitable, compulsory or permissive. (Citing cases.)

As Mr. Douglas put it in Case v. Los Angeles Lumber Products Co., 1939, 308 U. S. 106, 126-127, 60 S. Ct. 1, 12, 84 L. Ed. 110: 'And once the jurisdiction of the court has been invoked, whether by the debtor or by a creditor, that petitioner cannot withdraw and oust the court of jurisdiction. He invokes that jurisdiction risking all of the disadvantages which may flow to him as a consequence, as well as gaining all of the benefits.' "

In re Solar Manufacturing Corporation, 200 F. Rep. 2d, the court stated at page 329:

"Prior to Alexander v. Hillman, 1935, 296 U. S. 222, 56 S. Ct. 204, 80 L. Ed. 192, the pertinent law generally was that although a bankruptcy court could consider defenses to claims filed against the bankrupt estate and was empowered to set off any claims of the estate against the claimant up to the amount of the claim, it was without jurisdiction to render an affirmative judgment against the claimant, absent the latter's consent to jurisdiction. In the Hillman opinion the Supreme Court held that former officers of a corporation in receivership who had filed claims with the equity receiver, but who had not been served with process, subjected themselves to the jurisdiction of the district court for the purposes of counterclaims based on their alleged misappropriations. The court noted that since the subject matter of the counterclaims, like the claims, was cognizable in equity the district court had jurisdiction to grant affirmative relief.

The reasoning of Hillman was thereafter applied to bankruptcy cases. In Florance v. Kresge, 4 Cir. 1938, 93 F. 2d 784, it was decided that an unsecured creditor who had filed a proof of claim and a petition of intervention submitted himself to the jurisdiction of the court for purposes of a counterclaim which arose out of a contract between claimant and bankrupt and was asserted by the receivers and trustee. The court did not characterize the counterclaim as either equitable or legal, although it seems to have been the latter. The Fourth Circuit in Columbia Foundry Co. v. Lochner, 1950, 179 F. 2d 630, 14 A. L. R. 2d 1349, held that a corporation which had filed a proof of claim based on goods sold and delivered and had

voted at the first meeting of creditors subjected itself to the trustee's counterclaim for a breach of warranty. There also the counterclaim was legal in character."

After citing *In re Nathan* and other cases, the court continued at page 331 as follows:

". . . We are in accord with the Nathan opinion that the Hillman rule should be extended to cover situations like the one before us. We hold that Marine subjected itself to the court's summary jurisdiction respecting the counterclaims when it filed its account and proofs of claim. . . ."

In *Collier on Bankruptcy,* 14 ed., it is stated on page 790 (see Supplement):

"One who files a proof of claim should be held to acquiesce in the adjudication of any proper set-off or counterclaim even to the extent of a judgment thereon, since as pointed out in the *Kresge* case, the claimant puts himself in a position, should his interests warrant, to challenge the receiver's or trustee's acts and the demands of others claiming as creditors. He should not be permitted to claim the benefits of such a position, and yet maintain a favored advantage as against the trustee or receiver, compelling that officer to resort to a plenary action to collect on a claim that is a proper subject of set-off or counterclaim."

In *Nixon v. Goodwin,* 3 Cal. App. 358, the court said on pages 363 and 364 as follows:

"The rule is that a director of an insolvent corporation cannot receive to himself any preference or advantage over other creditors in the payment of his debt (Bonney v. Tilley, 109 Cal. 346 (42 Pa. 439)); and surely the same rule would apply with equal force to one who is a large

creditor of the corporation of which he is a director and the president, and who resigns today that he may tomorrow (secretly as to all other creditors) accept a conveyance to himself of the corporation's property.

Nor would such a transfer coming under the provisions of Section 3452 of the Civil Code, where a debtor may pay one creditor in preference to another, or may give one creditor security for the payment of his demand in preference to another, because such action, when taken by a director, or one so lately holding that relation, would be taking an unfair as well as unlawful advantage of other creditors, and would be an attempt pure and simple to prevent a ratable distribution of the insolvent's assets among his creditors. The defendant does not stand as an ordinary common creditor; for, notwithstanding his resignation as director and president for the purposes for which tendered, he cannot escape the conclusion inevitably to be reached that he stands still in the same light the law views a director of a corporation when it forbids him making himself a preferred creditor, and any attempt at so doing, in our opinion, would subject him and his acts to the same prohibition as though he were still a director. A man cannot be permitted to so easily throw off his trust relations, and, as here, for the purpose of giving him an advantage over ordinary creditors, that he may take the property which he as a director has been holding in trust for all the creditors and apply it on his own debt to their detriment."

In *Title Ins. Co. v. California Dev. Co.*, 171 Cal. 173, the court said on pages 206, 207:

"Directors and officers of a corporation occupy a relation to other creditors 'demanding the utmost good

faith on their part in the handling of the corporation assets. * * * ' * * * 'Directors of an insolvent corporation who have claims against the company as creditors,' says Mr. Morawetz (2 Morawetz on Corporations, 2d ed., sec. 787), 'cannot secure to themselves any preference or advantage over other creditors, by using their powers as directors for that purpose.' (Citing cases.) The rule is so firmly established that further citation of authority is unnecessary."

In *Stuart v. Larson,* 298 Fed. 223, the court used the following language on pages 227, 228:

"The courts are not agreed as to the power of directors of insolvent corporation to prefer themselves, and while directors may in good faith, advance money to keep a corporation a going concern and take security therefor, yet the great weight of authority in this country is that the directors of an insolvent corporation, who are also creditors thereof, have no right to grant themselves preferences or advantages in the payment of their claim over other creditors, and such rule is merely applied common honesty. A director occupies a certain fiduciary position toward the stockholders and the creditors. He has better facilities for knowing the condition of the company than have the other creditors, and he ought not to be permitted to use that position to benefit himself at their expense. * * *

In Cook on Stock and Stockholders, section 660, it is said: 'It is a fraud on the corporation and on corporate creditors for the directors to buy up at a discount the outstanding debts of the corporation and compel it to pay them the full face value thereof. In such a case the directors may be compelled to turn over to the cor-

poration the evidence of indebtedness upon being paid the money which they gave for the same.' "

In re the Van Sweringen Company, 119 F. 2d 231, 234, the court said:

"* * * As expressed by Chief Judge Cardozo in Meinhard v. Salmon, 249 N. Y. 458, 464, 164 N. E. 545, 546, 62 A. L. R. 1: 'Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. * * * Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.' "

In *Buffum v. Barceloux Company,* 289 U. S. 277, it is stated:

"As an outcome of these maneuvers the Barceloux Company canceled an indebtedness of about $33,000, and became the owner of stock certificates worth triple that amount. The unconscionable sale is not to be viewed in isolation, as something disconnected from the pledge, an accident or afterthought. It was the fruit for which the seed was planted, or so the trier of the facts might look at it. The Barceloux Company set out to do some-

thing more than secure the payment of a debt. It became a party to a plan to appropriate a surplus and in combination with its debtor to hold his creditors at bay."

In *Pepper v. Litton,* 60 S. Ct. 238, 308 U. S. 295, the court said:

"And so-called loans or advances by the dominant or controlling stockholder will be subordinated to claims of other creditors and thus treated in effect as capital contributions by the stockholder not only in the foregoing types of situations but also where the paid-in capital is purely nominal the capital necessary for the scope and magnitude of the operations of the company being furnished by the stockholder as a loan."

Section 824 of the Corporations Code states:

"Unlawful purchase of shares, declaration or payment of dividends, or withdrawal or distribution of assets. Except as provided in this division, the directors of a corporation shall not authorize or ratify the purchase by it of its shares, or declare or pay dividends, or authorize or ratify the withdrawal or distribution of any part of its assets among its shareholders."

In *Saracco Tank & Welding Co. v. Platz,* 65 Cal. App. 2d 306, plaintiff was the judgment creditor of the Contact Mercury Mines Co., Inc., a Nevada corporation, and the judgment against it has not been satisfied. Thereupon, an action was commenced by the judgment creditor against the directors and officers of the judgment debtor, who had caused the assets of the judgment debtor to be transferred to a California corporation, without dissolution of the debtor corporation and without notice to the judgment creditor. Plaintiff, the judgment creditor, was

awarded judgment against the directors and officers of the judgment debtor corporation for the amount of the unpaid claim. The court declared:

(1a)

"We are of the opinion the findings and judgments are adequately supported by the evidence. The judgment is founded on the statutory liability in favor of creditors and against directors of a foreign corporation doing business with this state, for violation of their official duties in making unwarranted 'distribution of assets,' as provided by section 412 of the Civil Code."

(1b)

"The evidence satisfactorily shows that while the appellant was acting as secretary and as a director of the Nevada corporation, with full knowledge of plaintiff's unpaid claim and of other indebtedness in the aggregate sum of $9,000, he organized a new corporation and participated in the transfer of all property and assets of the foreign corporation to the new Contract Mining Company, leaving the former corporation defunct and insolvent."

(4)

". . . It has been held the directors of corporations are trustees for the benefit of stockholders and creditors. (Winchester v. Howard, 136 Cal. 432, 442 (64 P. 692, 69 P. 77, 89 Am. St. Rep. 153); 6A Cal. Jur. 1100, Par. 620.) In the Winchester case, *supra,* it is said:

"Directors are also trustees for stockholders and indirectly for the creditors. They have always been held responsible as trustees in their management of the property and affairs of the corporation."

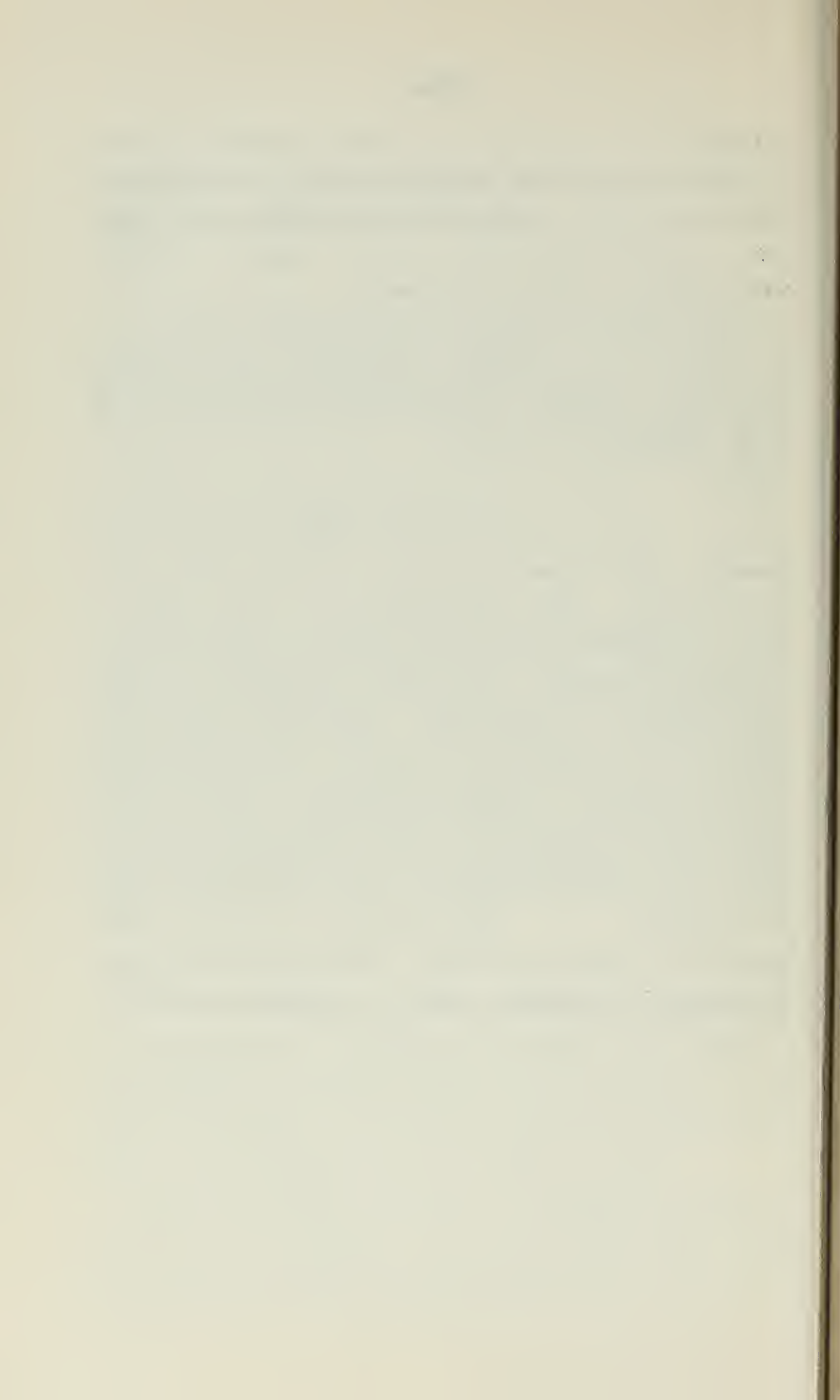
(5)

When a corporation becomes insolvent its assets are held in trust for the benefit of the stockholders and creditors. In 15A Fletcher's Cyc. of Corp., perm. ed. (1938), section 7369, at page 59, it is said:

"The theory of the trust fund doctrine is that all of the assets of a corporation, immediately on its becoming insolvent, become a trust fund for the benefit of all of its creditors." * * *

(6)

". . . *The transfer was made without notice to the plaintiff. The original corporation never thereafter transacted business.* That transaction was a clear breach of trust and rendered the directors liable for the loss thereby sustained to plaintiff. *The transfer amounted to a voluntary dissolution of the Nevada corporation, without providing for the payment of all of its debts.* It resulted in a preference of existing creditors. Section 401a of the Civil Code provides that a distribution of assets to the stockholders on dissolution of the corporation may be made only 'after determining that all of the known debts and liabilities . . . have been paid or adequately provided for.' This was not done. The directors are therefore liable for plaintiff's claim." (Emphasis supplied.)



No. 13672.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Harry J. Coffman,

Appellant,

vs.

Cobra Manufacturing Company,

Appellee.

APPELLANT'S REPLY BRIEF.

FILED

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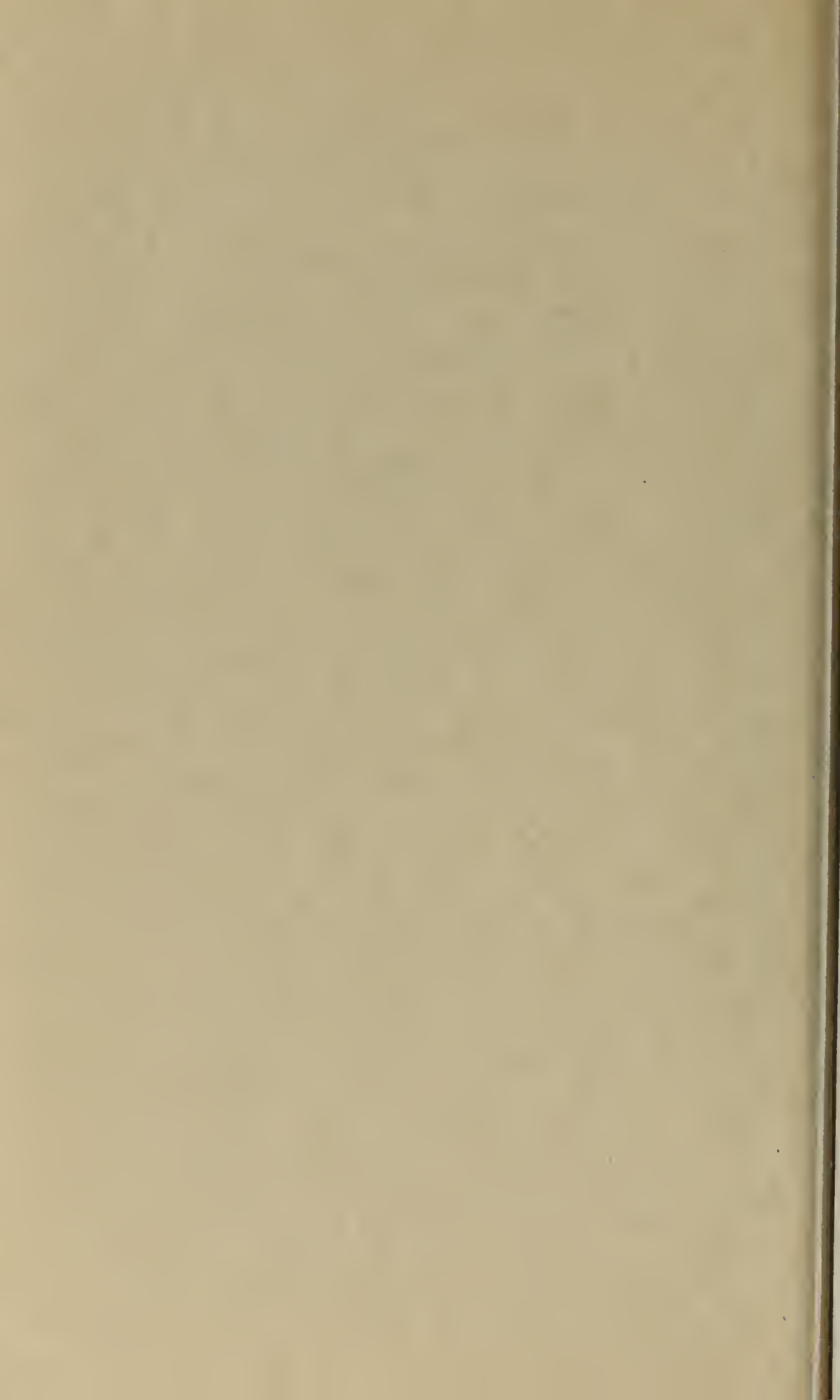

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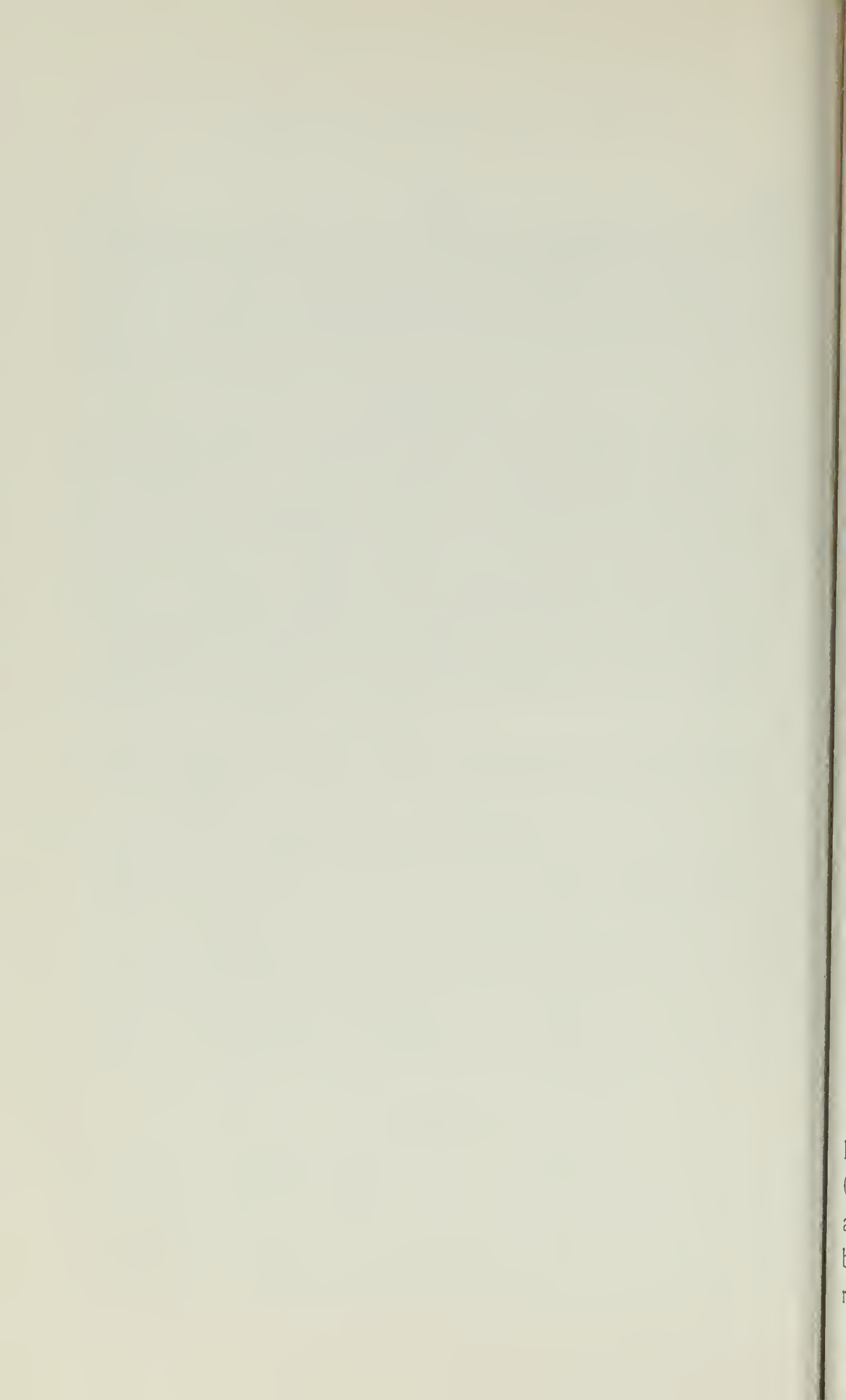

No. 13672.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Harry J. Coffman,

Appellant,

vs.

Cobra Manufacturing Company,

Appellee.

APPELLANT'S REPLY BRIEF.

Appellant Harry J. Coffman, respectfully submits herewith his brief in reply to the answering brief of Appellee herein.

I.

The Order of the Referee Did Not Constitute a Valid Judgment for the Payment of Money Which Was Enforcible by Execution.

A.

At page 24 of its brief, Cobra contends that the referee had jurisdiction to make the order finding that Aircraft Company was indebted to Cobra in the sum of $6,254.25, and argues that the cases cited by the appellant in his brief at page 14 denying such jurisdiction have been rejected.

An examination of the cases relied upon by Cobra discloses that its contention is without merit. These cases go no further than to hold that a referee has jurisdiction to render an affirmative judgment against a creditor who has filed a claim against a bankrupt estate upon a counterclaim asserted by the trustee, *where the counterclaim relates to the very subject matter of the creditor's claim itself.* Such were the factual situations presented in each of the cases referred to by Cobra.

This point is summarized in the recent case of *In re Solar Manufacturing Company* (C. C. A. 3), 200 F. 2d 327, 331, where the Court says, in speaking of the holdings in *Alexander v. Hillman,* 296 U. S. 222, 56 S. Ct. 254; *Florence v. Kresge* (C. C. A. 4), 93 F. 2d 784; *Columbia Foundry v. Lochner* (C. C. A. 4), 179 F. 2d 630, and *In re Nathan* (D. C. Cal.), 98 Fed. Supp. 686:

> "In Hillman, Kresge, Lockner and Nathan, as in this appeal, *the subject matter of the counterclaim arose out of the same transaction as the claim. This is important because in those circumstances, as we have above indicated, the trustee may have a summary adjudication* of the issues upon which his counterclaim depends by raising these issues in his answer to the claim."*

Floro Realty Co. v. Stem Electric Co. (C. C. A. 8), 128 F. 2d 338, cited at page 24 of Cobra's brief, is likewise subject to the same analysis. The case of *Griffin v. Vought* (C. C. A. 2), 175 F. 2d 186, cited at page 24 of Cobra's brief, is not strictly in point. There, the Court merely held that Section 57(g) of the Bankruptcy Act

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*Unless otherwise indicated, emphasis in citations has been supplied.

under which claims of a preferred creditor are disallowed until the preference had been surrendered would be applied in a plenary action by the trustee to recover the assets.

In contrast to the foregoing cases, attention is directed the case of *In re Continental Producing Co.* (D. C. Cal.), 261 Fed. 627, cited in appellant's opening brief in support of the rule of law that a referee in bankruptcy does not have jurisdiction to render an affirmative judgment upon a counterclaim filed by the trustee in an amount in excess of the creditor's claim. The Court had under consideration there, as here, a counterclaim arising out of transactions which had nothing whatsoever to do and which were unrelated to the subject matter of the original creditor's claim and in denying jurisdiction stated that the trustee

> ". . . by way of defense set up a counterclaim in the sum of $43,700.00 as for monies owing to the bankrupt from the creditor *upon an entirely disconnected transaction* . . ."

This same situation is found in the case at bar. The original claim of Aircraft Company against Cobra was in the sum of $1,808.68 and was based upon a partial assignment made by one Albert Dunkin in favor of Charles W. Rollinson as attorney for Aircraft Company of an alleged future indebtedness from Cobra to Dunkin, and upon a garnishment served upon Cobra under an attachment in an action by Aircraft Company against Dunkin [Tr. pp. 5-6].

The counterclaim which Cobra filed against Aircraft Company was based upon totally independent and disconnected transactions, namely the furnishing of services,

labor and materials to Aircraft Company between May 7, 1945, and February 6, 1946 [Tr. pp. 8-11].

Clearly, there is absent from the case at bar the factual conditions which were found to be in existence in the cases cited in Cobra's brief and which were held to justify the assumption by the referee of jurisdiction to render an affirmative judgment. Here, the counterclaim was based upon totally unrelated transactions; consequently it could not form the basis for the exercise of jurisdiction by the referee under the cited authorities.

Furthermore, the claim of Aircraft Company and the counterclaim of Cobra thereto did not constitute or involve mutual debts and credits under Section 68 of the Bankruptcy Act, as contended for by Cobra at page 5 of its brief. As indicated, Aircraft Company's claim was based upon an assignment of an alleged future indebtedness due from Cobra to Dunkin and by Dunkin assigned to Aircraft Company's attorney. The Court held, however, that there never was any such indebtedness [Tr. p. 8]. This holding is a complete answer to the contention of Cobra that there were mutual debts or credits between the parties for, as stated in *McDaniel Nat. Bank v. Bridwell* (8 Cir.), 74 F. 2d 331, 333, concerning Section 68(a) of the Bankruptcy Act:

"From the wording of this subsection it is evident that, before a creditor may enjoy the use of the set-off principle against the bankrupt's estate, two essential elements must be established: (1) *Two debts must exist, one of the creditor and one of the bankrupt's estate.* (2) *These debts must be mutual, i. e., the creditor's debt must be owed to the estate of the bankrupt, and the estate's debt must be owed to this creditor.* When these conditions are fulfilled, the statute applies with full force

and may be taken advantage of." . . . *"If such conditions are not fulfilled and the required mutuality is lacking, set-off is impossible under the statute."*

Under the foregoing principles the conclusion is inescapable that since there was no debt from Cobra to Aircraft Company, there was consequently no basis for a set-off or claim of set-off under Section 68(a) of the Bankruptcy Act.

The referee, therefore, had no jurisdiction to enter the so-called judgment against Aircraft Company, for it has been held that a set-off cannot exist under Section 68(a) of the Bankruptcy Act unless the claim and counterclaim are so connected that the establishment of one operates to reduce the other. (*Cumberland Glass Co. v. DeWitt,* 237 U. S. 447, 454, 35 S. Ct. 636.)

The contention made by Cobra that lack of jurisdiction of the referee to render the judgment against Aircraft Company is urged for the first time and on appeal is without merit, for lack of jurisdiction may be urged at any time (13 Cyc. of Fed. Proc., 3rd Ed., Sec. 59.09, p. 339).

Furthermore, attention is directed to the general objection by Coffman based upon lack of jurisdiction expressly interposed by way of his exceptions to the report and findings of the special master [Tr. p. 64], and in his application to reject the supplemental report of the special master based upon all the previous papers, records and files of the case (which include the exceptions to the original report and findings of the special master [Tr. pp. 94, 95].)

tion for the payment of a money judgment. If there is no money judgment, no jurisdiction exists to institute, conduct or render any orders in proceedings supplemental to execution (33 C. J. S., Executions, Sec. 358, pp. 660-662). And when a judgment or order is void on its face, as here, it is not *res adjudicata* and it may be attacked at any time by anyone against whom it is sought to be enforced (49 C. J. S., Judgments, Sec. 401, p. 794).

II.

The Special Master Did Not Have Jurisdiction and Did Not Possess Any Power to Determine nor Was He Justified in Finding That Coffman's Denial of the Claimed Indebtedness to Aircraft Company Was Fictitious and Not Made in Good Faith.

At page 30 *et seq.,* of its brief, Cobra contends that the master was justified in finding that Coffman's conduct was fraudulent and in making the supplemental report and findings and conclusions therein contained. This contention is utterly without merit when consideration is given to the provisions of California Code of Civil Procedure, Section 719, under which a court loses jurisdiction to make an order in supplementary proceedings against a third person when the indebtedness or possession of property is denied. The denial of any indebtedness to Aircraft Company by Coffman resulting from Account No. 99-6 manifestly ousted the court of jurisdiction under the controlling California decisions. See

11 Cal. Jur., Executions, Section 91, page 159; *Pacific Coast Auto Ass'n v. Superior Court,* 121 Cal. App. 664, 668, 9 P. 2d 880.

The claim made by Cobra at page 22 of its brief that there was a stipulation for rereference of the proceedings to the special master adds nothing to the argument of appellee, because, as appears from the order made upon the stipulation in open court [Tr. pp. 77-79] the special master had made no finding whatsoever as to Account No. 99-6, although such account was introduced in evidence and was before him.

The matter was merely rereferred for the purpose of a finding as to whether or not Aircraft Company was indebted to Coffman as shown on the books of Aircraft Company. The master was not thereby empowered to decide upon the validity of the indebtedness or the obligations evidenced by thet entries therein, and he took no evidence concerning the same, deeming it unnecessary [Tr. p. 93].

Furthermore, the supplemental findings made by the master as to Account No. 99-6 were attacked not only by objections for insufficiency of the evidence but also for lack of jurisdiction (incorporated by reference from objections to the original master's report [Tr. p. 36; 99-100]); by motion to reargue objections; and by objections to proposed orders [Tr. pp. 103-104; 111-112; 120].

The supplemental finding and conclusion of law with respect to Account No. 99-6 is not only void procedurally, but is unsupported by the evidence within the doctrine of *Smyth v. Barneson* (9 Cir.), 181 F. 2d 143, 144. An examination of Account No. 99-6 and Account No. 180 shows that Coffman repaid Aircraft Company for funds advanced the sum of approximately $15,000.00 in cash between November, 1945, and June, 1947.* This repudiates the claim of Cobra that Coffman was without funds.

Furthermore, Coffman's right to an offset is not based upon the testimony of witnesses. His right to an offset rests upon specific written evidence, namely, Account No. 99-6 [Tr. pp. 66-71] which was introduced in evidence before the special master, and concerning which there was no other or further oral testimony. As pointed out at page 23 of appellant's opening brief, Account No. 99-6 was *prima facie* evidence of liability from Aircraft Company to Coffman and has never been impeached by any competent, valid testimony of any kind or character whatsoever. This account and the foregoing facts involving repayments manifestly show that Coffman's denial of indebtedness to Aircraft Company was substantial, real, and was made in good faith. Clearly, the master's supplemental findings, conclusion and report with respect to Account No. 99-6 were arbitrary based upon conjecture, and without any evidentiary support whatsoever.

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*See Appendix—Schedule of Payments Made by Coffman as Shown on the Books of Aircraft Company.

III.

The Order Requiring Coffman to Make Restitution Is Void.

California Code of Civil Procedure, Section 719, is printed at the Appendix to appellant's brief. Under that statute, to which reference is hereby made, it is clear that no order can be made by a judge or referee unless there is ". . . money or property in the hands of any other person or claimed to be due from him to the judgment debtor. . . ."

It is thus the law that in proceedings supplemental to execution, the creditor must establish the facts necessary to show relief, *i. e.*, the existence of the interests sought to be reached. Unless there is a showing of money or property in the possession of the third person, no order can be made against him. (33 C. J. S., Executions, Section 385, page 706; *High v. Bank of Commerce,* 103 Cal. 525, 37 Pac. 508; *McCullough v. Clark,* 41 Cal. 298.)

The record in this case is totally devoid of any evidence whatsoever and none has been shown by appellee that Coffman possesses any money or property belonging to Aircraft Company. The special master went no further than to find that Coffman, between May 1, 1945 and June 30, 1948 appropriated funds of Aircraft Company totalling $9,240.46, that such appropriation was wrongful, and that Coffman is indebted to said Aircraft Company in said sum [Tr. pp. 52-53]. He did not find possession by Coffman of any money or property belonging to Aircraft Company.

Since neither the Court nor the special master had proof of the possession by Coffman of any property belonging to or money due to Aircraft Company which could be directed to be applied on or in satisfaction of the so-called judgment, the burden was not sustained, and consequently, there was no legal basis for the order appealed from herein under which Coffman is ordered to pay to Cobra the sum of $6,254.25 plus costs [Tr. pp. 124, 125].

A review of the hearings below clearly discloses that the special master departed from the permissible scope of a supplemental examination and converted the hearing from an asset discovery proceeding into a general civil trial. In the original report of the special master, the master states as the basis for his findings and conclusions that Coffman was a dominant stockholder of Aircraft Company and that he diverted its assets contrary to his obligations as a director [Tr. p. 91]; in the supplemental report, the special master not only held that Account No. 99-6 lacked integrity, but added that, assuming it to be legitimate, he would nevertheless find that Coffman was not entitled to the offset therein appearing as that would place him in the position of a preferred creditor [Tr. pp. 92-93].

It thus clearly appears from the report and supplemental report of the special master that the proceedings were carried on not in aid of execution as provided by law, but without jurisdiction and as a substitute for and in lieu of a civil action to set aside preferential transfers

—all in the face of Coffman's good faith denial of any obligation to Aircraft Company arising from its offsetting indebtedness to him. This is directly and expressly contrary to the law of California, both in its statute (Code of Civ. Proc., Sec. 719) and the decision of its Supreme Court. See *Wulfjen v. Dalton,* 24 Cal. 2d 878, 151 P. 2d 840.

Finally, the attempt of Cobra to sustain the *in personam* order made by the trial court requiring Coffman to pay Cobra the sum of $6,254.25 together with costs and interest [Tr. pp. 124-125], as a proper exercise of the contempt powers of the court is absolutely untenable. First, it has been expressly held that an order cast in the form used by the trial court herein is unauthorized in the absence of any evidence or a finding to show that the party to be charged possesses property or funds belonging to the judgment creditor and upon which the order can operate. (*First National Bank, etc. v. Lufcy* (8 Cir.), 34 F. 2d 417; *Boyd v. Glucklich* (8 Cir.), 116 Fed. 131.) Second, it is a prevailing rule, universally adopted, that past acts cannot be punished by the court as a contempt. (12 Am. Jur., Contempt, Sec. 61, p. 430.) Both the constitution and statutes of California prohibit imprisonment for debt, except in case of fraud. (See Const. Calif., Art. I, Sec. 15; Calif. Code of Civ. Proc., Secs. 478, 479.) This prohibition is expressly extended to and made mandatory upon federal courts by express Congressional Act. (28 U. S. C. A., Sec. 2007(a).)*

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*See Appendix.

Conclusion.

We believe that we have demonstrated in this reply brief that appellee has not answered the points made by us in our opening brief demonstrating the invalidity of the order herein appealed from. We believe that we have clearly shown that there is nothing in the record herein nor in the citations and authorities submitted by appellee by which the order made by the trial court against appellant can be lawfully sustained. Upon the principles, precedents and authorities set forth in our opening brief and in this brief, it is therefore respectfully submitted that the order appealed from be reversed.

Respectfully submitted,

Reynolds, Painter & Cherniss,

By Louis Miller,

Attorneys for Appellant Harry J. Coffman.

APPENDIX.

Record of Payments Made in Cash by Coffman to Aircraft Company.

(1) Account No. 99-6 shows the following cash credit entries made by Aircraft Company in favor of Nash-Wilshire:

Date of Item	Amount
Nov. 8, 1945	$ 100.00
Nov. 12, 1945	50.00
Nov. 10, 1945	100.00
Dec. 11, 1945	460.00
Feb. 18, 1946	500.00
Feb. 26, 1946	500.00
Mar. 31, 1946	2,100.00
Apr. 30, 1946	2,200.00
Aug. 31, 1946	1,500.00
Aug. 31, 1946	300.00
Oct. 31, 1946	3,564.84
Nov. , 1946	550.00
Mar. 31, 1947	1,687.46
Mar. 31, 1947	412.02
Apr. 30, 1947	500.00
	$14,524.32

(2) Account No. 180 shows the following cash credit entry made by Aircraft Company in favor of Coffman:

Date of Item	Amount
July 31, 1946	$300.00

28 U. S. C. A., Section 2007(a) provides as follows:

"A person shall not be imprisoned for debt on a writ of execution or other process issued from a court of the United States in any State wherein imprisonment for debt has been abolished. All modifications, conditions, and restrictions upon such imprisonment provided by State law shall apply to any writ of execution or process issued from a court of the United States in accordance with the procedure applicable in such State."

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Petition for Rehearing, or in the Alternative, for Revision of Court's Opinion and Decision.

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Cobra Manufacturing Company,

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Petition for Rehearing, or in the Alternative, for Revision of Court's Opinion and Decision.

Appellee, Cobra Manufacturing Company (for sake of brevity called "Cobra") respectfully petitions for a rehearing, or in the alternative, for a revision of the opinion and decision of this learned Court filed herein on June 28, 1954, reversing the factual findings made by the learned United States District Court of the Southern District of California Central Division, and the judgment of said last mentioned Court, based on said factual findings. The distinct grounds on which this petition is predicated are elaborately discussed in the supporting Points and Authorities and the appendices herewith submitted, which in the judgment of the appellee will serve to clarify and facilitate a correct understanding of the genuine and controlling factual and legal issues posed by the record. Succinctly stated, this petition is predicated on the following distinct grounds:

I.

Under Rule 69(a) of the Federal Rules of Civil Procedure, the California substantive and procedural law is made the controlling rule in supplemental proceedings in aid of federal judgments and executions. (This was so conceded by both counsel in their briefs and at the oral argument, and it was so correctly determined in the opinion of this Court.) The decision of this Court is in irreconcilable conflict with the California Constitution and the California procedural and substantive laws as hereafter pointed out.

II.

There is a fundamental and constitutional distinction between the jurisdiction of the federal appellate courts to review findings made by a trial judge under Rule 52(a) of the Federal Rules of Civil Procedure and the jurisdiction of the reviewing court in respect to such review under the California constitution.

A. Under Rule 52(a) of the Federal Rules of Civil Procedure the jurisdiction of an appellate court to disturb the findings of the trial judge is not subject to any statutory or constitutional limitations; under the California constitution, on the other hand, the jurisdiction of the reviewing court to set aside or reverse findings made by the trial court is circumscribed and delimited; and the reviewing court is without jurisdiction to reverse or to annul such factual findings, if they are supported by substantial evidence.

B. Sections 259a, 644, 645 and 719 of C. C. P. are *in pari materia* under which the determination made by a referee under an order of reference amounts to a *special jury verdict,* which (if supported by substantial evidence) cannot be constitutionally disturbed by the reviewing court.

C. The issue of the verity and integrity of bookkeeping entries made in the books and records under the "Uniform Business Records as Evidence Act" presents a factual question to be determined by the referee in the exercise of a sound discretion, and his determination (if supported by substantial evidence under the preponderance of the Evidence Rule) is conclusive and binding on the reviewing court.

D. The issue of "bad faith" under Section 719, C. C. P. also presents a factual question, and the determination by the referee (if supported by substantial evidence under the Preponderance of the Evidence Rule) is conclusive and binding on the reviewing court.

III.

Assuming (but not conceding) the jurisdiction of an appellate court to disregard the factual findings of the trial judge (despite the fact that same were supported by substantial evidence), the record herein establishes conclusively and as a matter of law that appellant's claim of good faith was a sham, fantastic, and palpably inconsistent with the realistic and objective facts. The record conclusively shows:

A. That the conversion of the property of the judgment debtor by appellant Coffman in excess of $20,000.00 was established conclusively by the documentary evidence, which is the best evidence (Section 1829, C. C. P), and that Coffman's claim of good faith in respect thereto, was refuted by the financial statement signed by him and submitted by the judgment debtor to the Hollywood State Bank, and also by his sworn admissions made in his answer in the Superior Court action referred to at page 88 of the record.

B. That the property and funds thus converted by appellant Coffman were assets which could be reached in a supplemental proceeding, since same could be reached in equity by a creditor's bill as formerly used in chancery.

C. That Coffman was the majority stockholder, director and president of the insolvent judgment debtor, and under the California substantive law he held the property, thus converted, *in trust* for the judgment creditor; and under no circumstances could Coffman claim an interest in said property adverse either to the judgment debtor or to the judgment creditor.

D. That under the California substantive law appellant Coffman could not under any circumstances use the property and funds of the judgment debtor in payment of, or as security for his loans and advances allegedly made by him personally to the judgment debtor.

It would follow, as a matter of law, that Coffman's claim of good faith was a sham, and that it did not present a triable issue to be determined in a plenary action under Section 720, C. C. P., or in any other cognate action, or proceeding.

IV.

It was the duty of this Court under the California constitution and under the California substantive and procedural law to make an analysis of the facts established by the record for the purpose of determining whether or not there was any evidence of a substantial character which reasonably supported the factual findings made by the learned District Court. The opinion of the Court indicates in effect (see p. 7 of the Opinion), that such an analysis was not made by this Court, and therefore there was no basis, either factual or legal, on which this Court could predicate a holding that Coffman's

claims against the judgment debtor were not made in bad faith. Furthermore, Coffman's assertion of his good faith was rejected as untrue by the learned District Court, and such determination is conclusive and binding on this Court and is not reviewable on appeal.

V.

Assuming (but not conceding) the jurisdiction of this Court to disregard the factual findings made by the trial court (despite the fact that they were supported by substantial evidence), appellant's belated contention that the special master and the District Judge lacked judicial power to adjudicate the factual integrity of his offset against the judgment debtor, is not reviewable on this appeal for the following additional reasons:

(a) This contention was not advanced at any time during the hearings before the special master, as required by the California Procedural Law.

(b) It was expressly stipulated by appellant in open court that the factual validity of his offset should be adjudicated by the special master; said stipulation was made freely and voluntarily, and his acquiescence therein precludes the appellant from raising this specific objection on appeal.

(c) This specific objection was not advanced by Notice of Motion in writing, as required by Section 259a (2), C. C. P.

(d) This specific objection was not advanced by appellant in his exceptions to supplemental report of the special master the record showing that appellant's objections to the supplemental report were predicated on the sole ground that the master's findings of facts and conclusions of law were not supported by the evidence.

VI.

The decisions in the *Parker* case (38 Cal. 522), and in the *Finch* case (12 Cal. App. 274) referred to in the Court's opinion cogently support appellee's contentions advanced in its answering brief and at the oral argument. It would seem that these decisions were predicated upon the constitutional power of the trial judge to adjudicate factual questions, and they were not based on any peculiarity of the facts therein involved as stated by this Court at page 6 of its opinion. Assuming (but not conceding) that the constitutional power of a trier of facts to adjudicate factual issues may be measured or weighed by the peculiarities of the facts in a given case, the record herein conclusively presents *peculiar facts* from which this Court must determine as a matter of law that Coffman's claim of good faith was a sham, since, as heretofore pointed out, he held the property of the judgment debtor *in trust for the judgment creditor, and he was not an innocent garnishee.* It is respectfully submitted that the California decisions cited in footnote 12 of the Court's opinion have no application or relevancy to the facts presented by the record, since none of them involve relations between an insolvent corporation and a majority stockholder, director and officer. These decisions are distinguishable on the facts and are commented on in Appendix VIII.

Appellee respectfully submits that this petition for rehearing presents grave constitutional questions; that the opinion of this Court is in an irreconcilable conflict with the constitutional and the procedural and the substantive law of the State of California. Appellee therefore suggests (pursuant to Rule 23 of this Court) that this petition for rehearing should be heard *en banc,* and that this

panel so suggest to the Chief Judge of this Court, so that the bar may have the benefit of an exchange of the views of all of the judges of this Court on these issues.

It is further respectfully submitted that in the event this petition for rehearing is denied, that this Court direct in its mandate to the trial judge to enter an injunctive order forbidding and restraining Coffman from making any transfer or other disposition of his property until a plenary action can be commenced and prosecuted by the appellee pursuant to Section 720, C. C. P.

It is further respectfully submitted that this Court direct the Clerk of this Court not to assess any costs against the appellee on this appeal, since assessment of costs lies within the discretion of this Court. We believe that the assessment of costs should abide by the results in the plenary action.

It is respectfully submitted that the petition for rehearing should be granted, and that the judgment of the District Court should be affirmed.

Respectfully submitted,

Ernest R. Utley, and
Joseph B. Beckenstein,

Certificate of Counsel.

We, the undersigned, attorneys for the appellee, do hereby certify that in our judgment the Petition for Rehearing is well founded, and that same is not interposed for delay.

Ernest R. Utley, and
Joseph B. Beckenstein.

POINTS AND AUTHORITIES.

Preliminary Brief Statement.

Appellee prefaces the discussion of the Points and Authorities with this preliminary statement:

(1) That the hearings before the special master lasted for about one year (from August 10, 1950, to and including June 28, 1951); and Coffman was represented during said numerous hearings by counsel, who at no time voiced any objection to the jurisdiction of the special master to make a determination of the factual matters referred to him by the learned District Judge.

(2) That at said hearings a complete record was made on every conceivable factual and legal issue, and Coffman testified under oath in respect to all of his dealings with the judgment debtor, including his dealings bearing on the factual and legal validity of his claimed offset against the judgment debtor.

(3) That while *legalistically* the instant supplemental proceeding assumed the form of a proceeding under Section 719, C. C. P., *realistically* (and divorced from Coffman's belated technicalities), the hearing amounted to a complete trial on the merits, implicit in the concept of a plenary action.

(4) That at no time did Coffman or his counsel object to this procedure before the special master.

(5) The record is devoid of a showing on the part of Coffman that the record was not complete, or that he did not have his day in court. On the contrary, the record conclusively shows that the issues involving his dealings with the judgment debtor, and his asserted equities, were all presented to the special master for adjudication, and

the judgment creditor and Coffman both adduced evidence in support of their respective contentions.

It is regrettable that counsel for appellee and appellant both mistakenly assumed and erroneously represented to the court at the oral argument that there was a seeming semblance, or a close analogy, between the summary jurisdiction of a referee in bankruptcy and the jurisdiction vested in a referee or judge sitting in a supplemental proceeding. Counsel for appellee have since re-examined the law on this important subject, and have become firmly and definitely convinced that there was no semblance of any kind between the jurisdiction of a referee in bankruptcy and the power of a referee or judge sitting in a supplemental proceeding. Counsel for appellee is of the firm opinion (which is supported by the authorities cited in the appendices) that the power of a referee or judge sitting in a supplemental proceeding stems from the California constitution, and that, pursuant to and in obedience to the California constitutional mandate, the referee or judge sitting in supplemental proceeding is a constitutional finder of the facts, whose determination is binding on the appellate court. This constitutional mandate is implicit in Sections 259a and 644 and 645 of the California Code of Civil Procedure, which are *in pari materia* with Section 719, C. C. P. By virtue of this constitutional mandate and based on the aforesaid sections of the California Code of Civil Procedure, the referee sitting in a supplementary proceeding is the constitutional finder of the facts, and his factual determination has the effect of a *special verdict of a jury*, and is conclusive on the reviewing court if his finding is supported by substantial evidence. (*Williams v. Flinn & Treacy,* 61 Cal. App. 352, 214 Pac. 1024.)

It is unfortunate that neither counsel had made a thorough study of the law on this important subject. Counsel for appellee state in all sincerity that they are greatly disturbed by their failure to make a more careful research of the law, lest such failure may have caused this learned Court to accept their mistaken representation at oral argument at its face value.

Counsel for appellee therefore respectfully pleads the indulgence and forbearance of this Court for their neglect to adequately assist this Court in its determination of this basic and vital legal issue.

For the benefit of this Court, we quote *in extenso* from the authorities submitted in support of the grounds set forth in the petition for rehearing.

The extended excerpts are set forth in the appendices.

These points while repetitious to some extent, will serve to aid this Honorable Court in resolving the key legal issues, namely: (1) Whether under the California Constitution and Sections 259a, 644, 645 and 719 of the California Code of Civil Procedure (which are all *in pari materia*) this Court possesses jurisdiction to substitute its own conclusionary factual findings for those of the trier of the facts, and (2) Whether a majority stockholder, and director and president of an insolvent corporate judgment debtor, stand in the shoes *of an innocent third party garnishee,* whose good faith denial of his indebtedness to the judgment debtor may under peculiar facts present a triable issue under Section 720 of the California Code of Civil Procedure.

Summary of Contentions.

I.

There is a fundamental and constitutional distinction between the jurisdiction of the federal appellate courts to review findings made by the trial judge under Rule 52(a) of Federal Rules of Civil Procedure, and the jurisdiction of the reviewing court under the California Constitution, and under Sections 249a, 644 and 645 and Section 719, C. C. P., all of which are *in pari materia.*

A. Under Rule 52(a) of the Rules of Civil Procedure, the jurisdiction of the federal appellate court to annul, or not to accept the findings of a trial judge or of special masters *is not proscribed by any statutory or constitutional limitations*; rule 52(a) is based on the practice in equity that had prevailed prior to the present rules of civil procedure, and the findings of the trial court were never conclusive upon the federal appellate courts. While the findings of the trial court had great weight, the federal appellate court was not prohibited from setting them aside if it was left with a definite and firm conviction that a mistake has been committed by the trial judge. (See Appen. I.)

B. Under the Constitution of the State of California, the trier of the facts is *the constitutional finder of the facts,* and his determination (if supported by substantial evidence) is conclusive and binding upon the appellate court, and the appellate court is divested of power to have them set aside. Under Section 259a, C. C. P., a commissioner appointed to conduct a hearing under an order of reference is constitutionally empowered to make factual findings; and under Sections 644 and 645, C. C. P., the factual findings of the referee have the effect of *a special jury verdict* which the appellate court has no constitu-

tional power to set aside if said verdict is based on substantial evidence. The issue of the verity and integrity of books and records under the "Uniform Business Records as Evidence Act," is a factual question to be determined by the referee in the exercise of a sound discretion, and his determination (if supported by substantial evidence) is conclusive on the appellate court. (See Appen. II.)

II.

The findings of the special master epitomized in his two reports (which were adopted by the learned District Judge) were supported by substantial evidence, as defined by the California decisions (see Appen. III); said findings are conclusive upon this Court, and this Court possesses no power to have them set aside. The reviewing court has no constitutional power to reject or disregard legitimate inferences which may be drawn by the trial judge from the evidence. The testimony of Coffman in support of his asserted offset against the judgment debtor was rejected by the master as lacking integrity, and his such determination is binding on this Court, and is not reviewable on appeal. (See Appen. III.)

III.

Proceedings under Section 719, C. C. P., are civil in nature. In civil proceedings, proof beyond a reasonable doubt is not required, even in cases where the theory of the case involves an accusation of a felony, and though the result thereof imputes a crime. There is no rule of law that adopts any sliding scale of belief in civil actions, since proof by the preponderance of the evidence satisfies the legal requirement. Section 2061(5), C. C. P., expressly states that the decision of the trier of facts must be according to a preponderance of the evidence; and

Section 2103, C. C. P., expressly provides that the decision of a referee under an order of reference must also be according to the preponderance of the evidence. The preponderance evidence rule equally applies to civil proceedings involving conversion of assets by a trustee, or any other fiduciary, or a director or officer of an insolvent corporation. It is sufficient to prove said conversion only by a preponderance of the evidence, and not beyond a reasonable doubt. (See Appen. IV.)

IV.

The expression or phrases to the effect that the evidence must be clear, explicit, unequivocal, so clear as to leave no substantial doubt, states only a rule of evidence *directed to the trial judge;* and whether the evidence was clear and convincing is a question for the trial court to decide, whose determination (if supported by substantial evidence under the preponderance of evidence rule), is binding and conclusive on the appellate court. In the case at bar, the special master found that the books and records of the judgment debtor lacked integrity; this determination was based on substantial evidence, and is binding and conclusive on this Court, and same is not reviewable. (See Appen. V.)

V.

Coffman's conversion of the property and assets of the judgment debtor in excess of $20,000.00 was established conclusively and undisputably by the documentary evidence, which is the best evidence (C. C. P., Sec. 1829.) Same constituted an indebtedness which can be reached in a supplemental proceeding. Coffman, being the majority stockholder, director, and president of the insolvent judgment debtor, held said property *in trust* for the bene-

fit of the judgment creditor. Under Sections 2229, 2232, 2236, and 2237 of the California Civil Code, Coffman had no legal right to convert said assets for his own individual use. Being a trustee, Coffman could not set up a claim to the trust property adverse to the judgment debtor, and under no circumstances could he deny title to the property in the judgment debtor. Being trustee, Coffman could not use the trust property in payment of his advances and loans allegedly made by him personally to the judgment debtor. (See Appen. VI.)

VI.

It was the duty of this Court to analyze the record for the purpose of determining whether or not there was any evidence of a substantial character which reasonably supported the findings of the learned District Judge. (*Estate of Bristol,* 23 Cal. 2d 221, 223.) The opinion of the Court indicates in effect (see p. 7) that this Honorable Court did not make such analysis, and it is respectfully submitted that there was no basis on which this Court could predicate a holding that Coffman's claims against the judgment debtor were not made in bad faith.

VII.

Supplemental proceedings are in effect a continuation of the principal action in which the judgment sought to be enforced was entered. (*Hatch v. Door,* 4 McLean 112 (U. S. Cir. Ct., Mich.).) Some are calculated to furnish an inexpensive and speedy method, unhampered by delays commonly resorted to by judgment debtors and persons in privity with them, to discover and reach any indebtedness due, or property belonging to the judgment debtor, which could be reached in equity by a creditor's bill, as formerly used in chancery. (*Herrlich v. Kaufman,*

99 Cal. 271; *Travis Glass Co. v. Ibbertson,* 186 Cal. 724.) While such a proceeding is a substitute for a creditor's bill as formerly used in chancery, and while same is equitable in nature (*Booge v. First Trust & Savings Bank of Pasadena,* 46 Cal. App. 2d 879), in legal effect it is an action at law in the nature of a judgment creditor's bill in equity, *whereby the judgment creditor is afforded an adequate remedy at law.* The judgment creditor, however, is not precluded from resorting to an action in equity if a supplemental proceeding does not afford *him* an adequate remedy at law. The choice of the most effective remedy (whether by an action in equity or by supplemental proceeding) is the problem of the judgment creditor. (*Mich. State Bar Journal,* Vol. 33, April 1954 issue, at p. 44.) The text of this article was concurred in by the California Supreme Court in *Wulfjen v. Dolton,* 24 Cal. 2d 878 (referred to in footnote 12 of the Court's opinion), wherein the California Supreme Court ruled as follows:

a. That a supplemental proceeding is designed to give the judgment debtor *an adequate remedy at law* (p. 889).

b. That the remedy provided by supplemental proceeding *is not exclusive of any other remedies* which may be available to the judgment creditor (p. 889).

c. That the judgment creditor had the legal right to resort to an action in equity if such action was the most effective remedy (pp. 889, 899).

(The decision in the *Wulfjen* case does not involve the construction of either Section 719, C. C. P., or of Section 720 of C. C. P. This case is commented on in Appendix VIII.)

Assuming (but not conceding) the jurisdictional power of this Court to annul and reverse the findings of the

trier of the facts, albeit they were supported by substantial evidence, the record herein establishes undisputably and incontrovertibly that Coffman's claimed offset was a sham, fantastic, and unbelievable *as a matter of law.* As previously pointed out, Coffman held the property of the judgment debtor *in trust* for the benefit of the judgment creditor, and that he could not *under any circumstances* claim an interest adverse to the judgment debtor, and that he could not under any cricumstances use the funds of the judgment debtor in payment of, or to secure the advances or loans allegedly made by him personally to the judgment debtor. (See Appen. VI.)

VIII.

Appellant's contention, that the special master and the learned District Judge lacked judicial power to adjudicate the factual integrity of his offset against the judgment debtor, is not reviewable on this appeal, for the following additional reasons: (a) This contention was not advanced at any time during the hearings before the special master; (b) Appellant expressly stipulated in open court that the factual validity of his offset should be adjudicated by the special master. This stipulation was made freely and voluntarily, and his acquiescence therein precludes him from raising this objection on appeal; (c) This objection was not advanced by Notice of Motion in writing, as required by Section 259a(2), C. C. P.; (d) nor was his objection advanced in the exceptions to the supplemental report of the special master. The record shows that his objections to the supplemental report were predicated *on the sole ground that the master's findings of fact and conclusions of law were not supported by the evidence.* (See Appen. VII.)

Conclusion.

On the Law of Trusts and Trustees (which is the focal legal point in the proceeding at bar) we deem it advisable to invite the court's attention to the following additional citations which, in our judgment, deserve reflective reading. They establish the fundamental proposition that:

> No one may take advantage of his own wrong. Void things are no things. He that is guilty of inequity appeals in vain to equity.

Maitland's Equity (2d Ed.), p. 80;

Maitland's Equity (2d Ed.), pp. 43, 83;

Lewin on Trusts (13th Ed.), pp. 191, 11;

1 Perry on Trusts and Trustees (6th Ed.), p. 10, Sec. 13;

26 Ruling Case Law, p. 1232;

2 Pomeroy's Equity Jurisprudence (3rd Ed.), Sec. 956;

1 Perry on Trusts and Trustees (6th Ed.), p. 355, Sec. 206;

2 Restatement of the Law of Trusts, p. 1249;

3 Reed on Statute of Frauds (1st Ed.), p. 61, Sec. 595;

Waterman, Specific Performance (1st Ed.), p. 341, Sec. 251;

Sanford v. Sanford, 139 U. S. 642 (11 S. Ct. 666).

In 1 Pomeroy Equity Jurisprudence (2nd Ed.), Sec. 155, the author says, in citing many cases:

> "If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious

> manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, *and who is considered in equity as the beneficial owner.*" (Citing *Angle v. Railway Co.,* 151 U. S. 1 (14 S. Ct. 240.)

This important subject was not discussed by the appellant either in his briefs or at the oral argument. It is self-evident that this legal and equitable point which goes to the very heart of the instant proceeding, was obfuscated by the appellant's catch phrase that Coffman was a garnishee instead of a fraudulent trustee.

Putting aside (but not abandoning) the procedural point that the jurisdictional power of the special master to adjudicate the factual issues presented by the record was not challenged by the appellant at any time during the proceedings before the special master, as required by the California procedural law; and putting aside further that the jurisdictional power of the master was not challenged by the appellant in appellant's written exceptions to the supplemental report of the master, as required by Rule 53(e)(2) of the Federal Rules of Civil Procedure, the following highlights and critical points deserve special mention:

(1) This court correctly held that Coffman was the majority stockholder, director and president of the insolvent corporate judgment debtor. It would follow *as a matter of corporation and trust law* that Coffman held the assets and the funds of the insolvent corporate judgment debtor *in trust* for the benefit of the judgment creditor, and that Coffman could not under any circumstances

use said assets and funds for his own use and benefit, and that he could not legally and equitably assert or claim any interest or a property right in and to said assets and funds. It further follows as a matter of law that Coffman's asserted interest in the assets and funds of the judgment debtor was not adverse to the judgment debtor, and that the claimed indebtedness due him from the judgment debtor was not made in good faith.

(2) To put it bluntly in unvarnished language, the factual determination of the special master and of the District Judge was to the effect that Coffman's claimed offset against the judgment debtor was made not only in bad faith, but that it furthermore *constituted a fictitional and false paper book-making entry.* This finding, we respectfully submit, is conclusive upon this Court and cannot be disturbed. This is in accord with the decision in *Rosati v. Heinman,* 126 A. C. A. 50, wherein the California Appellate Court ruled that a referee under a general order of reference possessed the jurisdictional power to make a factual adjudication on the issue of the integrity of bookkeeping entries. This is also in accord with the decision in *Perske v. Perske,* 125 A. C. A. 946, wherein the Court stated, at page 952, as follows:

> "Of course, a trial court cannot arbitrarily disregard uncontradicted testimony. But where, as here, the trial court *(by its finding that the property was not purchased entirely with appellant's funds)* has necessarily found that the so-called uncontradicted evidence *was false,* an appellate court will not interfere *if there is any basis at all to support the trial court."* (Emphasis supplied.)

(In the proceeding at bar the evidence convincingly showed that Coffman at no time had any funds of his

own on which he could predicate the genuineness and verity of his claimed offset against the debtor corporation, and the trier of the facts so found.)

It would seem that the learned opinion of this court (if same is allowed to stand, or unless it is revised or clarified) spells out the following legal principles which counsel for appellee respectfully contend are incorrect and cannot be sustained:

(1) That the prohibition imposed by the California constitution on the jurisdiction of the reviewing court to disturb the factual findings of the trier of the facts does not apply to supplemental proceedings.

(2) That C. C. P., Sections 644 and 645 are not *in pari materia* with C. C. P., Section 719; and therefore, the factual findings of a referee under an order of general reference does not constitute *a special jury verdict or a finding made by a trial judge in the same manner as if the action had been tried by the court.*

(3) That under C. C. P., Section 719 (which is admittedly a civil proceeding) the decision of the trier of the facts must not be according to a preponderance of the evidence, as required by C. C. P., Sections 2061(5) and 2103; and that under Section 719, C. C. P., the decision of the finder of the facts must rest on proofs beyond a reasonable doubt (like in criminal cases).

(4) That the phrase or expression to the effect that the evidence must be convincing, clear, explicit and unequivocal "so clear as to leave no substantial doubt" (which is used in the California decisions in typical cases where such proof is required), is not a rule of evidence which is directed solely to the trial judge; and that the reviewing court is not precluded to reject the factual

findings of the trier of facts if in *its judgment* the evidence adduced does not meet this test.

(5) That a majority stockholder, director and president of an insolvent corporate debtor does not hold its property and funds *in trust* for its creditors; that he is not a trustee, *but only an innocent third party garnishee;* and that he may make an assertion and claim that he has title or an interest adverse to the insolvent corporate debtor, and to its creditors who are the *cestui que* trust thereof.

(6) That a majority stockholder, director and president of an insolvent corporate debtor may legally use its funds in payment of, or as security for advances or loans made by him personally to the judgment debtor without the consent of or notice to the creditors. (*Cf., Saracco Tank & Welding Co. v. Platz,* 65 Cal. App. 2d 306.)

(7) That a majority stockholder, director and president of an insolvent judgment debtor may with impunity make the mere assertion that he has a claim against the judgment debtor, and that the trier of facts must accept this assertion at its face value, despite the determination of the trier of the facts that such claim was made in bad faith and was a phony and a false issue.

(8) That the good faith of Coffman's assertions (which weer all refuted by the realistic and objective facts and by the documentary evidence, and by his sworn admissions set forth in his answer to the *Fitzgerald* case) did not constitute a subversion or an abuse of process. (*Cf., Corum v. Hartford,* 67 Cal. App. 2d 891 at p. 896.)

(9) That the finder of the facts was bound to accept Coffman's claim of good faith as true despite the fact that such a rule on the record herein would make

the finder of the facts a consenting party to a fraud, upon the administration of the law. (*Cf., Serwer v. Serwer* (N. Y.), 71 App. Div. 415, 75 N. Y. Supp. 842.)

While we share the Court's view that due process of law commands a plenary action when and if there exist genuine and good faith triable issues, the record herein does not present such issues, and the finder of the facts so found, which is conclusive upon the reviewing court.

We respectfully contend that the opinion of this Court is in irreconcilable conflict with the California constitutional and procedural and substantive law under the holding of the United States Supreme Court in *Erie v. Tompkins* (304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.)

With all deference to this Court we earnestly urge that this Court has misconstrued and misinterpreted the California law. We earnestly urge that the Court reconsider the facts established by the record and the findings of the learned special master and of the District Judge in the light of the law set forth in the appendices and in the above stated Points. We are firmly convinced, and do so state without fear of contradiction, that the grounds urged in the instant petition for rehearing, or for revision of the Court's opinion are all sound, and that they merit reconsideration by this Court.

To our mind Coffman's conduct in some essential aspects is a carbon copy of the conduct that shocked the conscience of Judge Fee in the summary proceeding entertained by the bankruptcy referee in *Heath v. Helmick,* 172 F. 2d 157, referred to at page 3 of the appellant's answering brief. We are apprehensive that the opinion of the court in the proceeding at bar will tend to encourage and stimulate fiduciaries and trustees to appro-

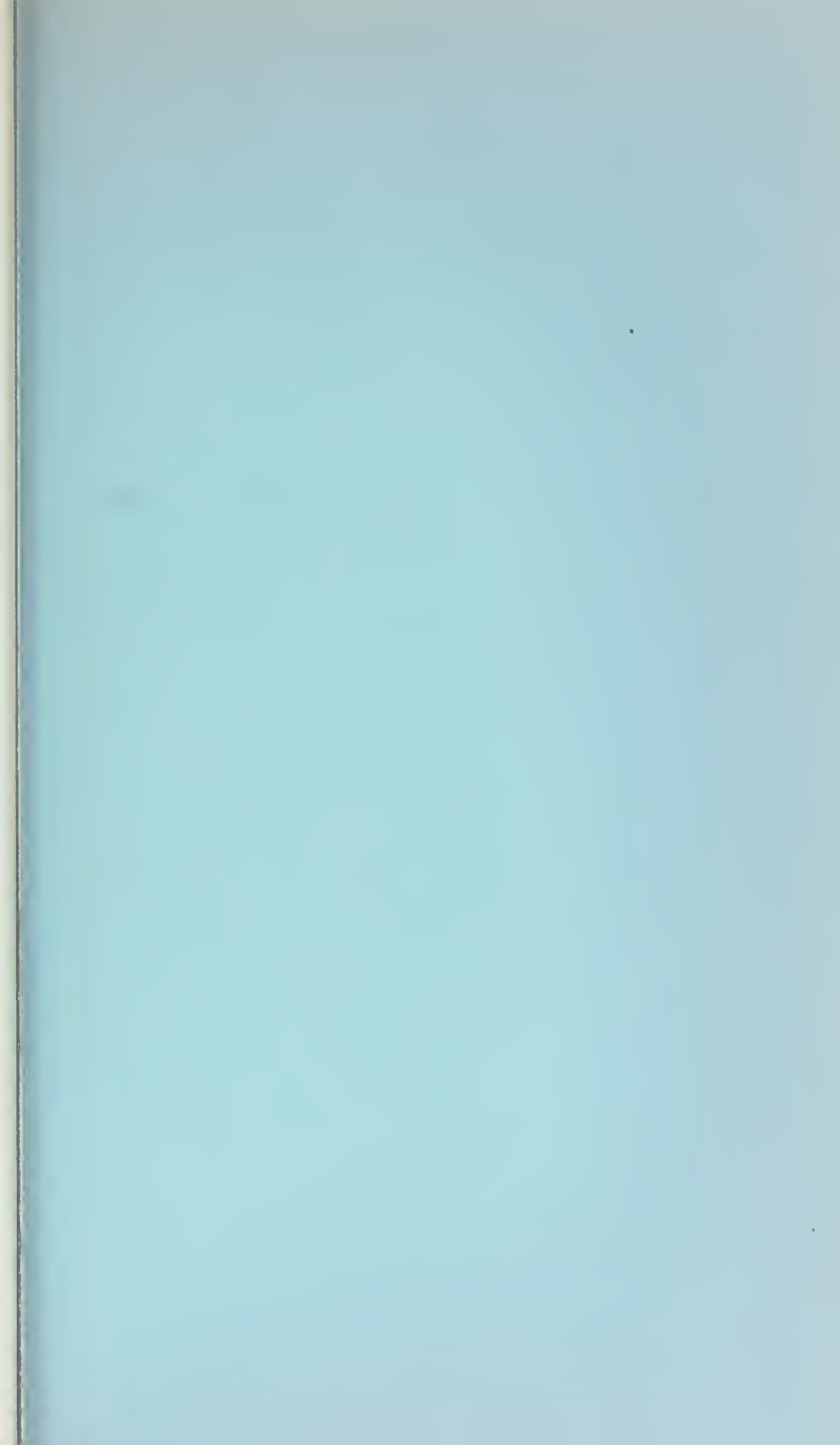
priate for their individual use and benefit the property of the *cestui que trust* and to delay the day of judgment by making the pretense that they are *innocent third party garnishees* (rather than trustees), and that they are entitled to a plenary action, albeit such claim is specious and abstruse *as a matter of law,* and is factually inconsistent with and contradicted by the documentary evidence and the sworn admissions in the related pleadings in the *Fitzgerald* case.

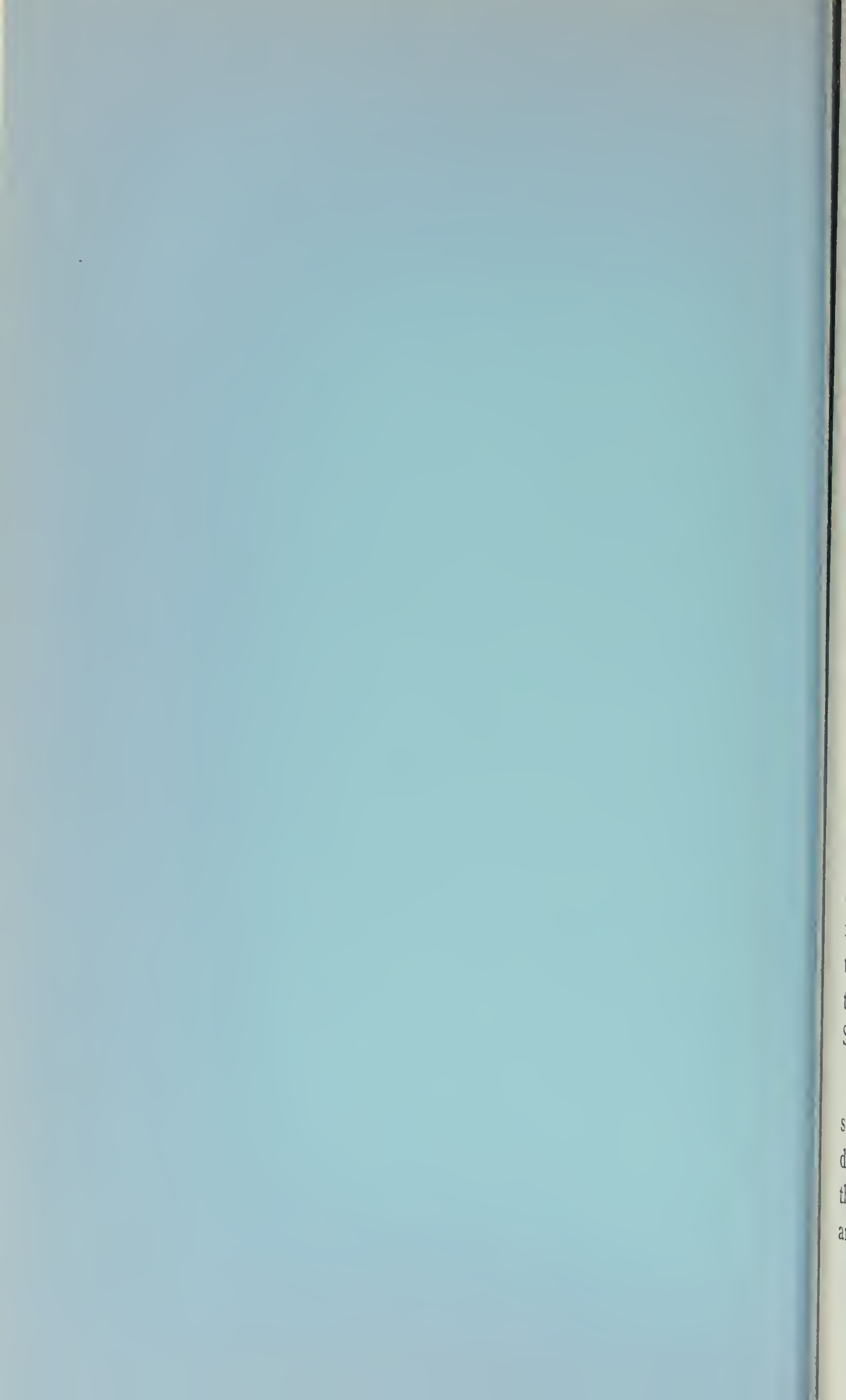
We therefore respectfully request this Court that our petition for rehearing, or for revision of the opinion, be granted, and that it affirm the judgment rendered by the Honorable Peirson M. Hall, who, the record shows made a painstaking effort to properly and correctly appraise the facts in the light of the applicable law.

Respectfully submitted,

Ernest R. Utley, and
Joseph B. Beckenstein,

Attorneys for Appellee.





APPENDIX I.

Under the Federal law the trier of the factual issues is *not a constitutional finder of the facts,* and the jurisdiction of the reviewing court to annul his findings is not restrained by any statutory or constitutional limitations. In the case of *Grace Bros. v. Commissioner of Internal Revenue,* 173 F. 2d 170, the Court stated, at page 174, as follows:

"It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. *Since judicial review of findings of trial courts does not have the statutory or constitutional limitation* [on judicial review] of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' The practice in equity prior to the present Rules of Civil Procedure was that the findings of a trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. *The findings were never conclusive, however.* A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citing a United States Supreme Court decision.)

"This interpretation is not a new departure. It merely stresses, as courts of appeal (including this court), have done before, that findings are to be given the effect which they formerly had in equity." (Citing Equity Rule 70½, and cases.)

See also, the authorities set forth in the footnote below.[1]

The concept of Federal Rule 52(a) is historically and basically akin to the equity practice and rules adhered to in common law states (like Michigan and Massachusetts).

In *Brown v. Kalamazoo Circuit Judge,* 75 Mich. 274 (42 N. W. 827), the Michigan Supreme Court declared at pages 277-279, as follows:

"As Michigan had a long territorial experience, its judicial system naturally became fashioned in close analogy to that of the United States, and so recognized and perpetuated in their essentials the classification of legal and equitable rights as involving the necessity of separate administration in important particulars. The Constitution of the United States recognized the division of ordinary civil jurisprudence into cases at law and cases in equity, and it has been held by the Supreme Court of the United States that this recognition puts it beyond the power of Congress to make any serious change in that classification. In *Carpentier v. Montgomery,* 13 Wall. 480, the importance of the distinction, and the impracticability of disregarding it, was somewhat explained in such a case as is now under consideration, as in several previous cases it

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[1]*National Labor R. Board v. Columbian Stamping Co.,* 306 U. S. 292, 59 S. Ct. 501, 505; *Miller v. Commissioner of Int. Revenue,* 183 F. 2d 246; *United States v. Gypsum Co.,* 333 U. S. 364, 395, 68 S. Ct. 525; *Bjornsen v. Alasea S.S. Co.,* 193 F. 2d 433; *Pac. Portland Cement Co. v. Food Machinery,* 178 F. 2d 541; *Home Indemnity of New York v. Standard Acc. Ins. Co.,* 167 F. 2d 919, 922; *Fisk v. Commissioner of Int. Revenue,* 203 F. 2d 358.

had been held that the policy enjoined by Congress of securing as far as possible uniformity of practice between the state and United States courts could not be carried so far as to confound the legal and equitable jurisdictions. (Citing United States Supreme Court cases.)

* * * * * * * * *

"As Michigan received the common law free from any older statutory admixture, it naturally followed the English divisions of law and equity, and under the enlightened administration of Chancellors Farnsworth and Manning the practice, which was largely shaped by legislation in accordance with their views, received the form which it now has, and our statutes embody in a very intelligible way a system so complete as to need very little aid from other sources.

* * * * * * * * *

"The sections of the statute which refer to the action of this Court in appellate cases remain unchanged, and are the only statutory method of bringing into this Court chancery appeals. As it is not competent for the Legislature to deprive the Supreme Court of its revisory jurisdiction over all the other State tribunals, no legislation which practically destroys it is valid."

APPENDIX II.

In contrast to the Federal Rule and Practice, under the California law the trier of the facts is the *constitutional* finder of the facts, and the power of the reviewing court to annul his findings (if same are supported by substantial evidence) is prohibited by the California Constitution.

In *Cherry v. Hayden,* 100 Cal. App. 2d 416, the Appellate Court declared at page 419, that the trier of the facts is *the constitutional finder of the facts.*

The constitutional prohibition to annul findings of the trier of facts (if same are supported by substantial evidence) is cogently expounded in the learned opinion of Judge Shenk in the leading case of *Tupman v. Haberkern,* 208 Cal. 256. At pages 262 and 263 of the opinion, the California Supreme Court declared as follows:

(1) Prior to the adoption of section 4½ of Article VI of the Constitution, in 1914, section 4¾ of the same article, in 1926, and section 956a of the Code of Civil Procedure, in 1927 (Stats. 1927, p. 583), it was firmly established that an appellate tribunal in this state possesses none of the functions of a jury, and that the sole province of the court on appeal was to review the action of the trial court, correct its errors, *and thus pass upon questions of law only.* This was the established rule of common law. *Slocum v. New York Life Ins. Co.,* 228 U. S. 364 [57 L. Ed. 879, 33 S. Ct. Rep. 523, see, also, Rose's U. S. Notes].) In *Bauder v. Tyrell,* 59 Cal. 99, it was said: "The trial court decides as to the facts, the court of review (in this state) as to questions of law only * * * it is founded in the essential distinction between the trial and the appellate court, and *grows out of considerations of jurisdiction;* that it is the province of the trial court

to decide questions of fact *and of the appellate court to decide questions of law; that this court can rightfully set aside a finding for want of evidence only where there is no evidence to support it, or where the supporting evidence is so slight as to show abuse of discretion."*

* * * * * * * * *

(5) Whether the error found to be present "has resulted in a miscarriage of justice" *presents a question of law on the record before the court,* and the purpose of the section (Section 4½ of Article VI of the Constitution) was to require the court to declare *as matter of law* whether the error has affected the substantial rights of the party complaining against it, *and not for the purpose of determining the evidentiary value of the testimony or where the preponderance of the evidence lies."* (Emphasis supplied.)

Even in criminal cases (where proof beyond a reasonable doubt is required) the constitution of California expressly states that the reviewing court has jurisdiction *"on questions of law alone."* (Const. Art. VI, Secs. 4-a and 4-b.)

In *People v. Gutierrez,* 35 Cal. 2d 721, 727 [221 P. 2d 22], the California Supreme Court said:

"After conviction all intendments are in favor of the judgment and a verdict will not be set aside unless the record clearly shows *that upon no hypothesis whatsoever is there sufficient substantial evidence to support it."* (Emphasis supplied.)

In *Estate of Bristol,* 23 Cal. 2d 221, the California Supreme Court stated at pages 223 and 224, as follows:

"The rule as to our province is: "In reviewing the evidence . . . all conflicts must be resolved in favor of

the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary . . . principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences *can be reasonably* deduced from the facts, the reviewing court *is without power to substitute its deductions for those of the trial court.*" (Italics added.) The rule quoted is as applicable in reviewing *the finding of a judge* as it is when considering a jury's verdict. The critical word in the definition is *"substantial"*; it is a door which can lead as readily to abuse as to practical or enlightened justice. [3] It is common knowledge among judges and lawyers that many cases are determined to the entire satisfaction of trial judges or juries, on their factual issues, by evidence which is overwhelming in its persuasiveness but which may appear relatively unsubstantial—if it can be reflected at all—in a phonographic record. Appellate courts, therefore, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding." (See also authorities cited in the footnote below.)[2]

Under Sec. 259a, C. C. P., a commissioner appointed by the Court to conduct a hearing is empowered to take proofs and report his conclusions on factual matters;

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[2]*Bernicker v. Bernicker,* 30 Cal. 2d 439, at pp. 443-445; *Kelly v. Bank of America,* 112 Cal. App. 2d 388; *Potter v. Pacific Coal & Lbr. Co.,* 37 Cal. 2d 592, at pp. 597-598; *Estate of Teel,* 25 Cal. 2d 520; *Lauder v. Wright Investment Co.,* 126 A. C. A. 167, at pp. 170-171.

under Sec. 644, C. C. P., the finding of the referee or commissioner must stand as the finding of the Court, and under Sec. 645, C. C. P., the finding of the referee has the effect of a special jury verdict. (*Williams v. Flinn & Treacy,* 61 Cal. App. 352, 214 Pac. 1024.)

In *Rosati v. Heimann,* 126 A. C. A. 50 (decided June 16, 1954), an order of reference was made by the State Superior Court to determine the amount of indebtedness due from the defendant to the plaintiff. In passing upon the legal effect of the evidence under the "Uniform Business Records as Evidence Act" (C. C. P., Secs 1953e-1953h), Judge Moore, speaking for the unanimous court, declared as follows:

"Whether a book of accounts meets the requirements of the law either as to the proximity of the entries to the date of the transaction or as *to the accuracy of the entries, is a question to be determined by the trial court in the exercise of a sound discretion."* (Emphasis added.)

The factual findings of the referee there were approved by the Superior Judge, and the appellate court ruled that said findings were conclusive upon the reviewing court.

Section 19 of Article VI of the Constitution of California provides:

"The court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case. *The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses."* (Emphasis added.)

It is the recognized and traditional rule that an issue of fact becomes an issue of law only where the evidence is such that only one conclusion can be reached by reasonable minds. In other words, if the evidence is such that reasonable minds might differ as to the conclusion to be reached, the issue is one of fact and not law, and an appellate court is bound by the determination of the trier of facts.

In *Washko v. Stewart,* 20 Cal. App. 2d 347, 348 (67 P. 2d 144), the California Appellate Court stated as follows:

"While the question of the sufficiency of the evidence to support a finding may be presented for review, the duty of the appellate courts stops when it has determined that there is some substantial evidence to support it. Ordinarily on appeal the court does not and should not pass upon the weight or preponderance of evidence, and it will uphold the finding of the trial court if there is some substantial evidence to support it, even though it would have decided otherwise if it had been the trier of the facts. (2 Cal. Jur. 912, 913.) No rule of appellate procedure is more firmly settled than this. In such cases the court is concerned only with the single inquiry, Does the record contain any substantial evidence tending to support the finding assailed?, and if there is such evidence, which is not inherently improbable, the answer must always be that the trial court has conclusively decided the question." (Citing cases.)

In *Potter v. Pacific Coast Lumber Co.,* 32 Cal. 2d 592, the Supreme Court stated, at pages 597-598, as follows:

"In the application of these settled rules to the present case, defendants properly recognize that 'A finding of the trial court upon conflicting evidence will not be disturbed on appeal if there is evidence of a substantial character which reasonably supports the judgment.' (Fewel & Dawes, Inc. v. Pratt, 17 C. 2d 85, 89.) Likewise, it must be said that the conclusions of a trier of facts from evidence or testimony that is reasonably susceptible of conflicting or opposing inferences will not be set aside by an appellate tribunal."

The doctrine of *pari materia* is discussed by the California Supreme Court in *In re Potterfield,* 28 Cal. 2d 91. The court stated at page 100 as follows:

> "It is a well recognized rule that for purposes of statutory construction the codes are to be regarded *as blending into each other and constituting but a single statute."* (Emphasis supplied.)

Sections 719 and 644 and 645 of the California Code of Civil Procedure *were all enacted in the same year (in 1872).* They are all *in pari materia* and the determination of the trier of the facts has the effect of a special jury verdict, which is conclusive and binding on the reviewing court under the California Constitution. The decision in the *garnishment Hartman* case (the first case referred to in footnote 12 of the opinion) was handed down *abaut fourteen years before the enactment of Sections 719, 644 and 645 of the California Code of Civil Procedure.*

APPENDIX III.

What constitutes *substantial evidence* sufficient to uphold factual findings of the trier of facts was clearly defined in California, as follows:

"In *Potter v. Pacific Coast Lumber Co.,* 37 Cal. 2d 592, the California Supreme Court stated that substantial evidence is such which may *reasonably* support the finding of the trial court.

"In Estate of Teed, 112 Cal. App. 2d 638, the appellate court stated:

" 'Substantial evidence' meant such relevant evidence as a *reasonable man* might accept as adequate to support a conclusion, and is reasonable in nature."

There must be more than a conflict of words to constitute a conflict of evidence. (*Fewel & Dawes, Inc. v. Pratt,* 17 Cal. 2d 85, 89.)

The reviewing court has no constitutional power to reject or disregard legitimate inferences which may be drawn by the trial judge from the evidence. (*Palmquist v. Mercer,* 43 A. C. 91 at page 94.)

All questions as to the preponderance and conflict of the evidence are for the trial court and his determination is binding on the appellate court. (*Wilcox v. Salomone,* 119 Cal. App. 2d 704 at p. 711.)

In the case at bar the record conclusively shows that the integrity of the books and records of the judgment debtor, and particularly in reference to Coffman's asserted offset against the judgment debtor was refuted by the financial statement signed by Coffman and submitted to the Hollywood State Bank. [Cr. Ex. 2.] The record

further conclusively shows that the integrity of the entries in the books and records of the judgment debtor was refuted by Coffman's sworn allegations in his answer filed in the case of *Thomas F. Fitzgerald v. Coffman,* referred to at page 88 of the record.

In *Branson v. Caruthers,* 49 Cal. 274, the testimony of the plaintiff at the trial was inconsistent with the factual allegations made by him in the pleadings; and the court ruled that the plaintiff's testimony at the trial lacked substantiality *as a matter of law.*

In *Beatty v. Pacific States,* 4 Cal. App. 2d 692, the court held: That contradictory factual allegations made in a pleading constitute purjury.

In 46 Corpus Juris, page 230, a large number of authorities are cited to the effect that: "Weight of evidence is not to be adjudged by the language of witnesses alone. It shocks the sense of legal morality to argue that if the trial justice is convinced from his observations of the witnesses and from the atmosphere of the trial that a case has been presented and a verdict secured by perjured testimony, he is bound to receive and approve the verdict, and may not set it aside. Such a rule would make the judge a consenting party to a fraud upon the administration of the law. There is no doubt that the trial judge not only has, but is bound to exercise, the power of setting aside a verdict which in his opinion has been secured by perjury."

APPENDIX IV.

In civil proceedings, proof beyond a reasonable doubt is not required. This is the universally established law and the California law is in accord.

In *Cooper v. Spring Valley Water Co.,* 16 Cal. App. 17, the court declared, at pages 21 and 22, as follows:

"In civil cases the affirmative must be proved, and when the evidence is contradictory, the decision must be made according to the preponderance of the evidence . . ." (C. C. P., sec. 2061, subd. 5.) In other words "the result should follow the preponderance of the evidence." (2 Wharton on Criminal Evidence, 1246), and this rule applies to all civil cases alike, even though the theory of the case involves, as it does here, an accusation of felony. (Citing cases.) This was declared to be so by our Supreme Court as early as the case of *Ford v. Chambers,* 19 Cal. 143.)

* * * * * * * * *

"It is the generally accepted doctrine in other jurisdictions that in civil cases, where a criminal act is directly pleaded or only incidentally involved, such criminal act may be established by a preponderance of evidence." (Citing cases.)

"It may be safely asserted that there is no rule of law sanctioned by the weight of authority which requires the plaintiff in a civil action, even though the result thereof imputes a crime, to prove his case with the same certainty that is required in a criminal prosecution. (Citing cases.)

"The reason for the rule limiting the burden of a plaintiff's proof in such cases to a preponderance of evidence

is founded largely "in the importance of preserving the distinction between civil and criminal cases with the growth of the criminal law. Almost every tortious act is by statute made indictable if done willfully or maliciously; and the courts should be reluctant to adopt, in civil cases, the rules peculiar to criminal law, lest wrongdoers be enabled to avoid civil liability, as well as escape criminal responsibility, under cover of the rules of criminal prosecution, the object of which is punishment only."

It was declared by the Michigan Supreme Court (*Stephenson v. Golden,* 279 Mich. 710, at page 734, 276 N. W. 849), that "there is no rule of law or of judicial reasoning that adopts any sliding scale of belief in civil actions." The court declared that in civil actions or proceedings, proof by the preponderance of the evidence satisfies the legal requirement. This is the universally accepted law, which is rooted in the importance of preserving the distinctions between civil and criminal cases, lest the wrongdoers be enabled to avoid civil liability. (*Cooper v. Spring Valley Water Co., supra.*) (See also 124 A. L. R. 1378.)

Section 2061(5), C. C. P., expressly states that a decision of the trier of the facts must be according to the preponderance of the evidence; and Section 2103, C. C. P. expressly provides that a decision of a referee appointed by the trial judge must likewise be according to the preponderance of the evidence.

The preponderance evidence rule equally applies to civil proceedings involving conversions of assets by a trustee, and it is sufficient to prove said conversion only by a preponderance of the evidence, and not beyond a reasonable doubt. (62 A. L. R. 1449.)

APPENDIX V.

The rule requiring proof by clear and convincing evidence *is directed to the trial judge*; and his finding, if supported by the preponderance of the evidence, is conclusive upon the reviewing court.

In re Jost, 117 Cal. App. 2d 379, involved a naturalization proceeding in which the application for naturalization was opposed by the government on the ground that the applicant was guilty of *bad faith* in that he had previously claimed an exemption from military service on the ground that he was a conscientious objector. The question of his bad faith was the crucial issue in the case. The court declared that the burden of proof was upon the government to prove the bad faith of the applicant by "clear and convincing evidence," and "clear, explicit, unequivocal evidence, so clear as to leave no substantial doubt, and sufficiently strong to command the unhesitating assent of every reasonable mind." The court ruled that this rule was directed to the trial judge, and in passing on the effect of substantial evidence under this rule, the court declared, at pages 387 and 388, as follows:

"No citation of authority should be necessary to demonstrate our position in respect to such a finding. (3) This court's duty, on appeal, begins and ends with the inquiry whether the trial court had before it evidence upon which an unprejudiced mind might *reasonably* have reached the same conclusion which was reached. * * * (4) When the evidence is conflicting, it will be presumed that the court found every fact necessary to support its order that the evidence would justify. (5) So far as the court has passed upon the weight of the evidence or credibility of witnesses, its implied findings are conclu-

sive even when based upon conflicting affidavits, and where the conflict is not sharp but only such as to create an uncertainty in the mind of the judge. (*Hyde v. Boyle,* 105 Cal. 102 (38 Pac. 643); *Kern Valley Bank v. Koehn,* 10 Cal. App. 679 (103 Pac. 173).)

"In *LaJolla Casa de Manana v. Hopkins,* 98 Cal. App. 2d 339 (219 P. 2d 871), this court said:

" 'A witness may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions or of his own conduct as to discredit his whole story. His manner of testifying may give rise to doubts of his sincerity and create the impression that he is giving a wrong coloring to material facts . . . Where conflicting inferences may be drawn from testimony, this court is bound by the findings of the trial court as conclusively as in other cases of conflict.'

"(6) If the finding of fact is based upon a reasonable inference it is not within the power of an appellate court to set it aside any more than it is within its power to set aside any other finding supported by any legal evidence. An appellate court cannot review a finding because in its judgment the inference adduced by the trial court is improbable or more unlikely to be true than the opposite one. Such a finding is as completely a finding based upon good and sufficient evidence as any other finding of fact." (Petition for hearing in the Supreme Court was denied.)

In *Wilcox v. Salomone,* 118 Cal. App. 2d 704 at page 710, the Court stated as follows:

"[1] It is presumed that a deed absolute on its face is what it purports to be. (17 Cal. Jur., Mortgages, §§56 and 57, and cases cited therein.) [2] However,

it is a well settled rule that a deed absolute in form may be shown to have been intended as a mortgage, and that such a deed is a mortgage if intended as security for the performance of an obligation. (17 Cal. Jur., Mortgages, §41; Civ. Code, §2924.) [3, 4] The burden of proving that a deed absolute is a mortgage rests upon the party who alleges it, *and the evidence must be clear, satisfactory and convincing; unequivocal and indisputable.* (17 Cal. Jur., Mortgages, §§58, 59.) [5] Whether the evidence to show that a deed was intended as a mortgage is clear and convincing *is a question for the trial court, whose determination on conflicting evidence is not reviewable on appeal.*" (Emphasis supplied.)

In *Thomasset v. Thomasset,* reported in 122 A. C. A. (Dec. 1953), 148 at page 155, the Court said:

[4] *There are expressions in the decisions to the effect that the separate character of property acquired after marriage is to be established by "clear and convincing evidence," "clear and decisive proof," "clear and satisfactory proof."* (Citing cases.) These expressions state a rule of evidence *directed to the trial court;* and if that court finds that the evidence meets the rule, a reviewing court must accept that determination as conclusive *if there is substantial evidence to support it.* (Citing cases.) The decision of the trier of fact must be according to the preponderance of evidence. (C. C. P., Secs. 2061(5), 2103.) [5] Whether the evidence adduced to overcome the presumption of community property is sufficient for the purpose *is a question of fact for the trial court.* (Citing cases.)

In *Perske v. Perske,* 125 A. C. A. 946 at page 952 (decided June 9, 1954), the Court states:

"Appellant urges that, under this evidence, the trial court was bound by the doctor's and her testimony, inasmuch as such testimony was uncontradicted, and was without power to disregard it. [4] Of course, a trial court cannot arbitrarily disregard uncontradicted testimony. [1c] But where, as here, the trial court (by *its finding that the property was not purchased entirely with appellant's funds*) has necessarily found that the so-called uncontradicted evidence was false, an appellate court will not interfere if there is any basis at all to support the trial court * * * The trial judge is the arbiter of the credibility of the witnesses. A witness may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions or of his own conduct as to discredit his whole story. His manner of testifying may give rise to doubts of his sincerity and create the impression that he is giving a wrong coloring to material facts. (Citing cases.)" (Emphasis supplied.)

This rule is well settled, is supported by many authorities, and is applicable to this case.

See also, authorities cited in the footnote below:*

**Rogers v. Mulkey,* 63 Cal. App. 2d 567, at p. 573; *LaJolla, etc. v. Hopkins,* 98 Cal. App. 2d 339, at pp. 345-346, 219 P. 2d 871; *Massow v. Granaglis,* 120 Cal. App. 2d 24, at pp. 27-28, 260 P. 2d 635; *Schnepfe v. Schnepfe,* 120 Cal. App. 2d 463, at pp. 466-7, 261 P. 2d 321.

APPENDIX VI.

Coffman's conversion of the property and assets of the judgment-debtor in excess of $20,000.00 was established conclusively and undisputably by the documentary evidence, and same constituted an indebtedness which can be reached in a supplemental proceeding for the reason that same could be reached by a Creditor's Bill in Equity (*Travis Glass Co. v. Ibbertson*, 186 Cal. 724). *The conversion was also established by Coffman's sworn allegations in his answer in the Fitzgerald case, referred to at page 88 of the record.*

As a matter of law, Coffman's claim of his indebtedness to the judgment-debtor was a sham, and under no circumstances could Coffman claim an interest adverse to the judgment-debtor.

In *Saracco Tank & Welding Co. v. Platz,* 65 Cal. App. 2d 306, the California Appellate Court declared that the assets of a debtor corporation, immediately upon its becoming insolvent, became a trust fund for the benefit of all of its creditors, and that a director of an insolvent corporation is a trustee for the benefit of the creditors of said corporation.

In 15A Fletcher's Cyc. of Corp., perm. ed. (1938), section 7369, at page 59, it was stated that: "The theory of the trust fund doctrine is that all of the assets of a corporation, immediately on its becoming insolvent, become a trust fund for the benefit of all of its creditors. * * *"

Section 2229 of the California Civil Code reads as follows: "A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner."

Section 2232 of the California Civil Code reads as follows: "No trustee, so long as he remains in the trust, may undertake another trust adverse in its nature to the interest of his beneficiary in the subject of the trust, without the consent of the latter."

Section 2236 of the California Civil Code prohibits the trustee to mingle the trust property with his own.

Section 2237 of the California Civil Code provides that a trustee who uses and disposes of the trust property may be required to account to the beneficiary.

Perry on Trusts and Trustees (Vol. I, 7th Ed., Par. 433, at p. 721) states that under no circumstances can a trustee claim or set up a claim to the trust property adverse to *cestui que trust,* and that under no circumstances could a trustee deny the title of the beneficiary.

In *Purdy v. Johnson,* 174 Cal. 521, the California Supreme Court declared at page 529, that a trustee cannot use trust property to secure repayment of advances made by him personally.

See also authorities cited in Appellee's brief at pages 31 and 32.

APPENDIX VII.

Appellant's contention urged in his brief and at the oral argument that the Master and the District Judge lacked judicial power to adjudicate the factual integrity of his offset, is furthermore not reviewable on this appeal, for the following procedural reasons:

A. This contention was not advanced at any time at any of the hearings before the special master. It was the duty of the Appellant to raise this contention before the Master. (*Rosati v. Heimann,* 126 A. C. A. 50, decided June 16, 1954.)

B. Appellant expressly stipulated in open court that the factual validity of his offset should be adjudicated by the special master. (See order re-reference at p. 77 of the record.) No reservation was made in said order of re-reference challenging the power of the special master to adjudicate this stipulated factual issue.

C. The ground of Coffman's belated claim bearing on the power of the Master to adjudicate this issue was not excepted to in writing, as required by Section 259a(2), C. C. P.

D. Nor was this ground advanced in Coffman's Exceptions to the Supplemental Report of the Special Master. (See Supplemental Report of Special Master beginning at p. 80 of the Record, and Coffman's Notice of Application to reject said Supplemental Report, beginning at p. 94 of the Record.) The Notice of the application to reject said Supplemental Report of the Master was

made on the sole ground that the Master's Supplemental Report and his findings of fact and conclusions of law *were not supported by the evidence.*

In *Riverside Heights Orange Growers' Ass'n v. Stebler,* 240 Fed. 703, this Court stated, at page 706, as follows:

"Exceptions to reports of masters in chancery are in the nature of a special demurrer, and the party objecting must point out the error; otherwise the part not excepted to will be taken as admitted." *Story v. Livingston,* 13 Pet. 359, 366, 10 L. Ed. 200 (citing *Wilkes v. Rogers,* 6 Johns. (N. Y.) 566). "A party neglecting to bring in objections cannot afterwards except to the report." *Id.; McMicken v. Perin,* 18 How. 507, 510, 15 L. Ed. 504. "Proper practice requires that objections to a master's report shall be taken in that (the trial) court, that any errors discovered therein may be rectified by the court itself, or by a reference to the master for a correction of his report, without putting parties to the delay and expense of an appeal to this court." *Topliff v. Topliff,* 145 U. S. 156, 173, 12 S. Ct. 825, 832 (36 L. Ed. 658).

See also the authorities listed in 5 Moore's Federal Practice, in Notes 14 and 15, at page 2969, and in Notes 20, 21 and 22, at pages 2970 and 2971.

APPENDIX VIII.

Comment on decisions cited in footnote 12 of the Court's opinion, at page 6:

The *Wolfjen v. Dolton* case, 24 Cal. 2d 878, has not the remotest kinship to the factual situation presented by the present record. It did not involve a supplemental proceeding, and it did not concern the construction of either Section 719 or of 720, C. C. P. Nor did it involve the constitutional question whether the findings of the trial court were conclusive and binding upon the reviewing court. It was an action in equity, instituted by the judgment-creditor against directors of the debtor corporation, praying for judgment declaring that the defendants were holding moneys for the use and benefit of the corporation. Upon conclusion of the plaintiff's case, a judgment of nonsuit was granted and the case reached the Supreme Court on an appeal from this judgment. The *prima facie* case established by the plaintiff's proofs was as follows:

(1) That the defendants had borrowed from a bank substantial sums of money and with the money so borrowed, and other funds, they organized the debtor corporation, of which they subsequently became its directors.

(2) That upon its incorporation the debtor corporation and the defendants entered into a valid and binding contract providing that the loans heretofore made by the defendants should be repaid by the debtor corporation *"out of the first net earnings"* (emphasis by the Court).

(3) That notwithstanding the fact that the debtor corporation had at no time earned any income (p. 882), the defendants withdrew funds from the debtor corporation in repayment of the loans advanced to the debtor corpo-

ration prior to its incorporation in violation of said written contract.

(4) That a demand was made by the judgment-creditor upon the defendants that suit be instituted by the corporation for the recovery of said funds, which demand was not complied with by the defendants.

Upon the conclusion of plaintiff's proofs, the defendants made a motion for a nonsuit, basing their contention on the ground that plaintiff had an adequate remedy at law inasmuch as plaintiff's remedy was confined to a supplemental proceeding.

In reversing the judgment of nonsuit, the Supreme Court ruled as follows:

(1) That the remedy provided by a supplemental proceeding was not exclusive of any other remedy which may be available to a judgment-creditor.

(2) That the judgment-creditor was not precluded from resorting to an action in equity inasmuch as his remedy under a supplemental proceeding was not adequate.

(3) That plaintiff made out a *prima facie* case and had established a clear breach of contract on the part of the defendants, since the contract provided that the loans made by the defendants were to be repaid out of the first net earnings and not out of the property or assets of the judgment-debtor.

(4) That the lower court had no legal right to grant a judgment of nonsuit for the reason that the plaintiff had established a *prima facie* case.

(5) That the defendants should have been compelled to present such evidence as they might have in their defense to justify the breach of said contract on their part.

It is respectfully submitted that this case is not an authority for the proposition that Coffman was entitled to a plenary action under Section 720, C. C. P. It would seem that this case supports appellee's contention rather than the contentions made by the appellant. This case is in accord with the doctrine announced in the Michigan State Bar Journal (heretofore referred to) which is to the effect that the choice of the most effective remedy (whether by supplementary proceedings or by an action in equity) is the problem of the judgment-creditor.

Ex parte Hollis, 59 Cal. 405, involved an insolvency proceeding, and an application for discharge upon a writ of habeas corpus. In this case creditors of a corporation had filed a petition in the State Superior Court to have the corporation adjudged an involuntary insolvent under the provisions of an Act of the legislature, entitled "An act for the relief of insolvent debtors, for the protection of creditors, and for the punishment of fraudulent debtors." Upon the filing of the petition the Court made an order requiring the corporation to show cause why it should not be adjudged an insolvent debtor, and a receiver was thereupon appointed by the Court to take charge of the estate of the corporation. *The order to show cause was not served on the petitioner, and he was not a party to the proceeding.* (Here Coffman was served with an order to show cause. A motion was filed by the petitioner to have the receivership order set aside, which was denied by the trial judge. Thereupon, a demand was made by the receiver upon the petitioner for the delivery to him of the assets of the corporation, which demand was not complied with by the petitioner. Upon his failure to comply with the receiver's demand an order was made by the Court requiring the petitioner to show cause why he should not be adjudged guilty of contempt of court, and

why he should not turn over to the receiver the assets in his possession belonging to the insolvent debtor. The petitioner denied that he had any money or effects belonging to the corporation except that he had collected certain rents *which were his own property.* In ruling that the Superior Court had no jurisdiction, the Supreme Court made the following significant statement, at page 412:

"We think such a power cannot be exercised over a party, *unless he has collected and holds the money and effects as trustee for the estate of the insolvent debtor.* . . ." (Emphasis supplied.)

The Court further held that the petitioner was not an officer of the court and not a party to the proceedings in insolvency, and that he claimed the property in his possession *adverse to all the world.* The Court further held that the petitioner had good title to the property, though it may have been obtained by fraudulent and corrupt practices between him and his grantor, *"except creditors and subsequent purchasers of the grantor."* (At p. 413.) The Court further held that the proceeding there was in legal effect analogous to proceedings supplementary to execution by a judgment-creditor *against a garnishee* who claimed the property as his own. (At p. 413.)

Without further burdening the Court with excerpts from this case, it is sufficient to point out (a) that Coffman was not a garnishee; (b) that Coffman was *a trustee* who could not assert any title against the judgment-creditor, and had no interest adverse to the insolvent corporation; and (c) that the proofs in the instant proceeding revealed, *as a matter of law,* that the property was the property of the judgment-debtor, which Coffman held in trust for the judgment-creditor.

Lewis v. Chamberlain (108 Cal. 525, 41 Pac. 413) also involved the relationship between a judgment-debtor and a third party garnishee. In this case the garnishee (the wife of the judgment-debtor) filed a written and verified answer specifically denying that the property in her possession was the property of the judgment-debtor, and specifically asserting under oath that the property was her own property. No such verified answer was filed by Coffman; and the record shows beyond dispute, and as a matter of law, that the property was the property of the judgment-debtor and that Coffman held said property *in trust* for the judgment-creditor.

Deering v. Richardson-Kimbal Co. (109 Cal. 73, 41 Pac. 801) also involved a relationship between the judgment-debtor and an innocent garnishee. It also involved claims of other persons who claimed liens upon the money in the possession of the garnishee bank. *The trial judge expressly found that there was no pretense of bad faith on the part of the bank* (p. 83). In the case at bar, as previously noted, Coffman *was not a garnishee,* but a trustee; and the trial court expressly found that his claim against the judgment-debtor was made in bad faith. Clearly, Coffman's position is not analogous to the position of the bank, who was an innocent party. The fact that the garnishee bank was acting in good faith, was an undisputed fact. It was further *undenied* that the claims of the other parties who claimed liens upon the money in the possession of the bank were made in good faith.

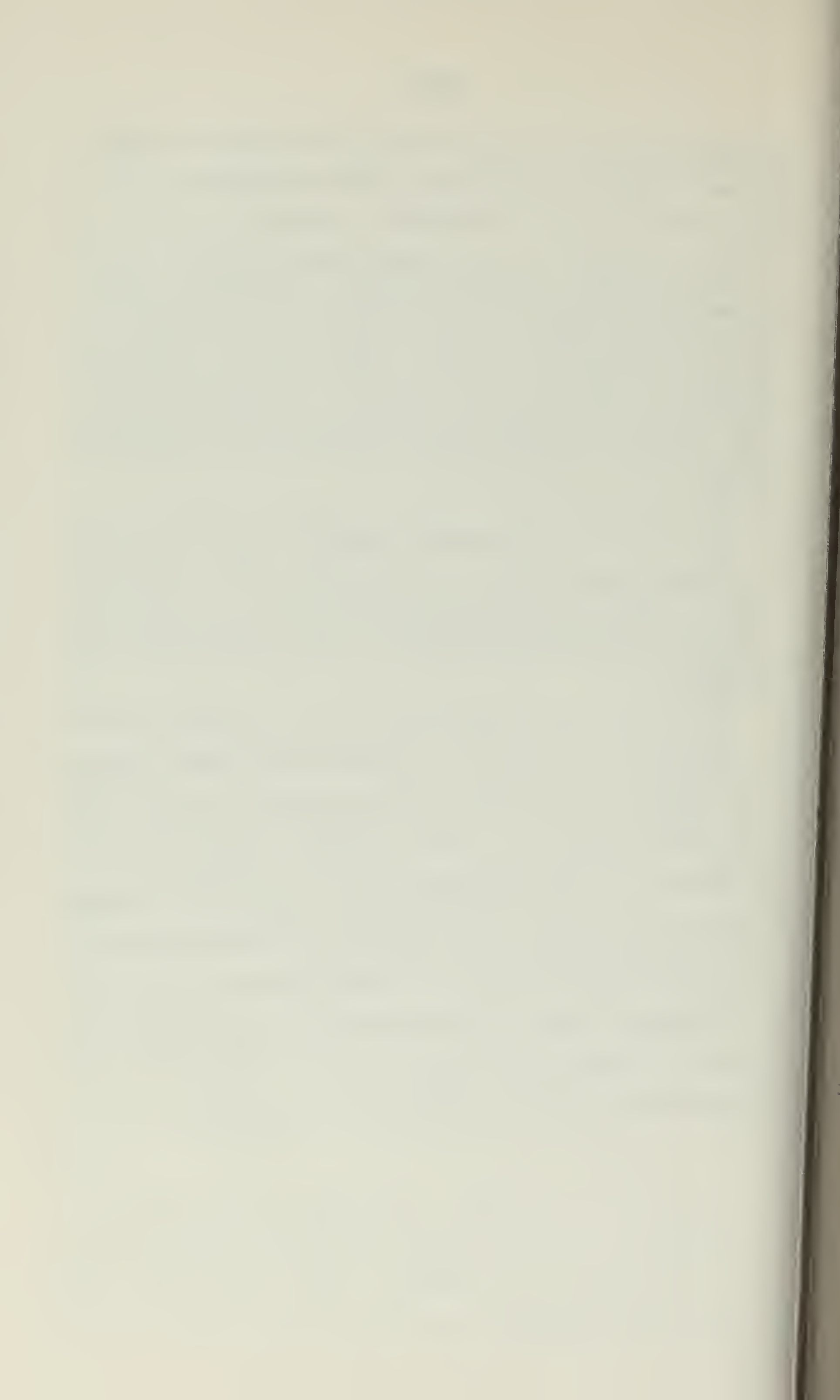
The early case of *Hartman v. Olvera,* 51 Cal. 501, involves the legal relationship existing between a judgment-debtor and a *third party garnishee,* and it does not involve or touch upon the legal and equitable relationship

existing between an insolvent corporate judgment-debtor and its majority stockholders, officers and directors (like in the case at bar). Furthermore, it should be noted:

(a) That this case was decided prior to the adoption of Sections 644 and 645 of the Code of Civil Procedure, which were enacted *in 1872.* Under said sections the finding of a referee under a general order of reference has the effect of a special jury verdict, and such determination cannot be constitutionally disturbed by the reviewing court.

(b) That the constitutional limitation imposed by the California constitution on the power of the reviewing court to disturb findings of trial judges or of referees under orders of general reference, was not discussed in the opinion.

(c) Under Section 644 of the Code of Civil Procedure the finding of the referee or commissioner must stand as the findings of the Court, and upon filing of the finding with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the Court. Said section, as previously pointed out, was enacted *in 1872, about fourteen years subsequent to the decision in Hartman v. Olvera, supra. Section 645 was likewise enacted about fourteen years after the decision in Hartman v. Olvera, supra;* and Section 719, C. C. P., were also enacted in 1872.



No. 13676

In the United States Court of Appeals for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

BEAR FILM CO., A CORPORATION, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

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ELLIS N. SLACK,
ROBERT N. ANDERSON,
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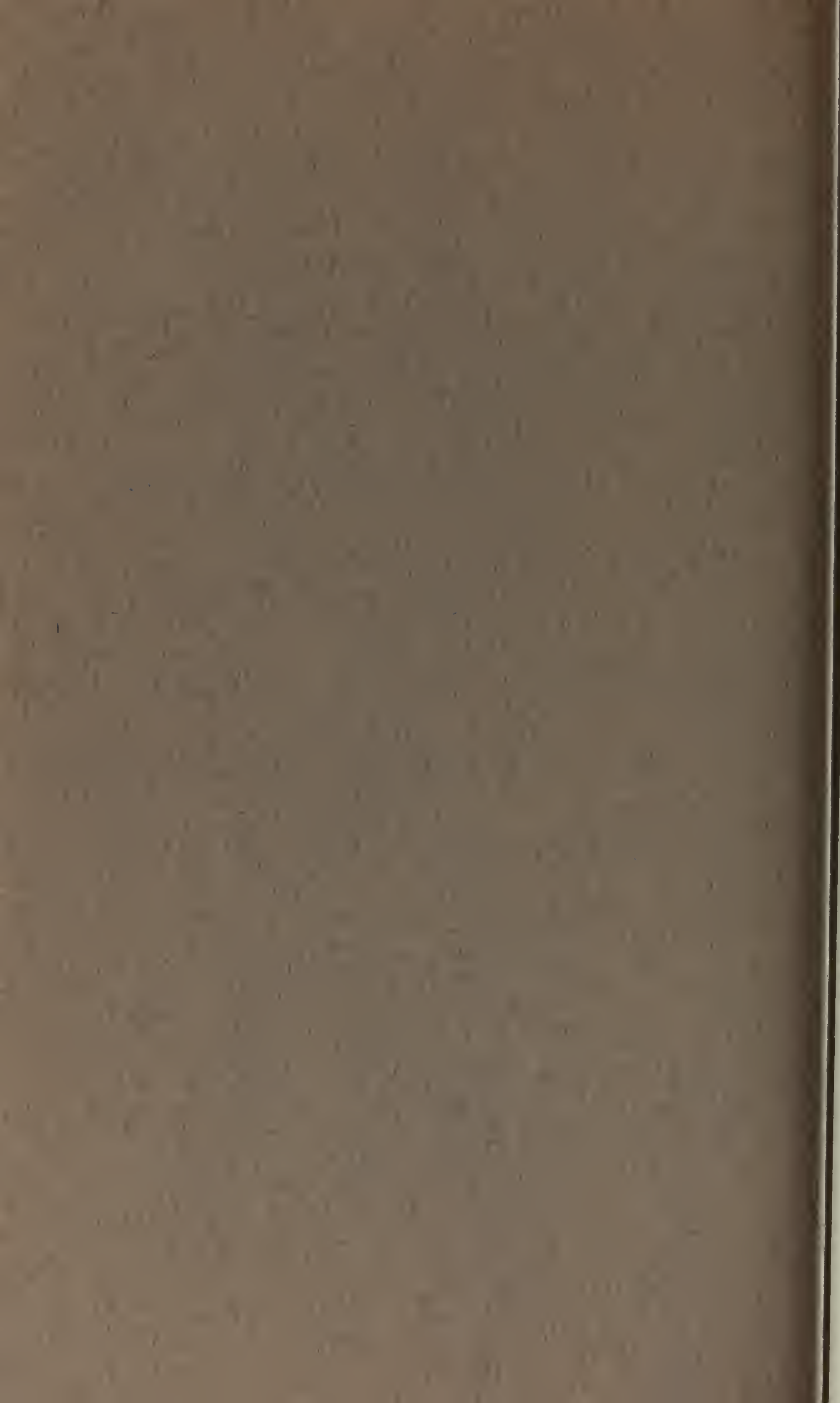
FILED

JUN - 8 1953

PAUL P. O'BRIEN



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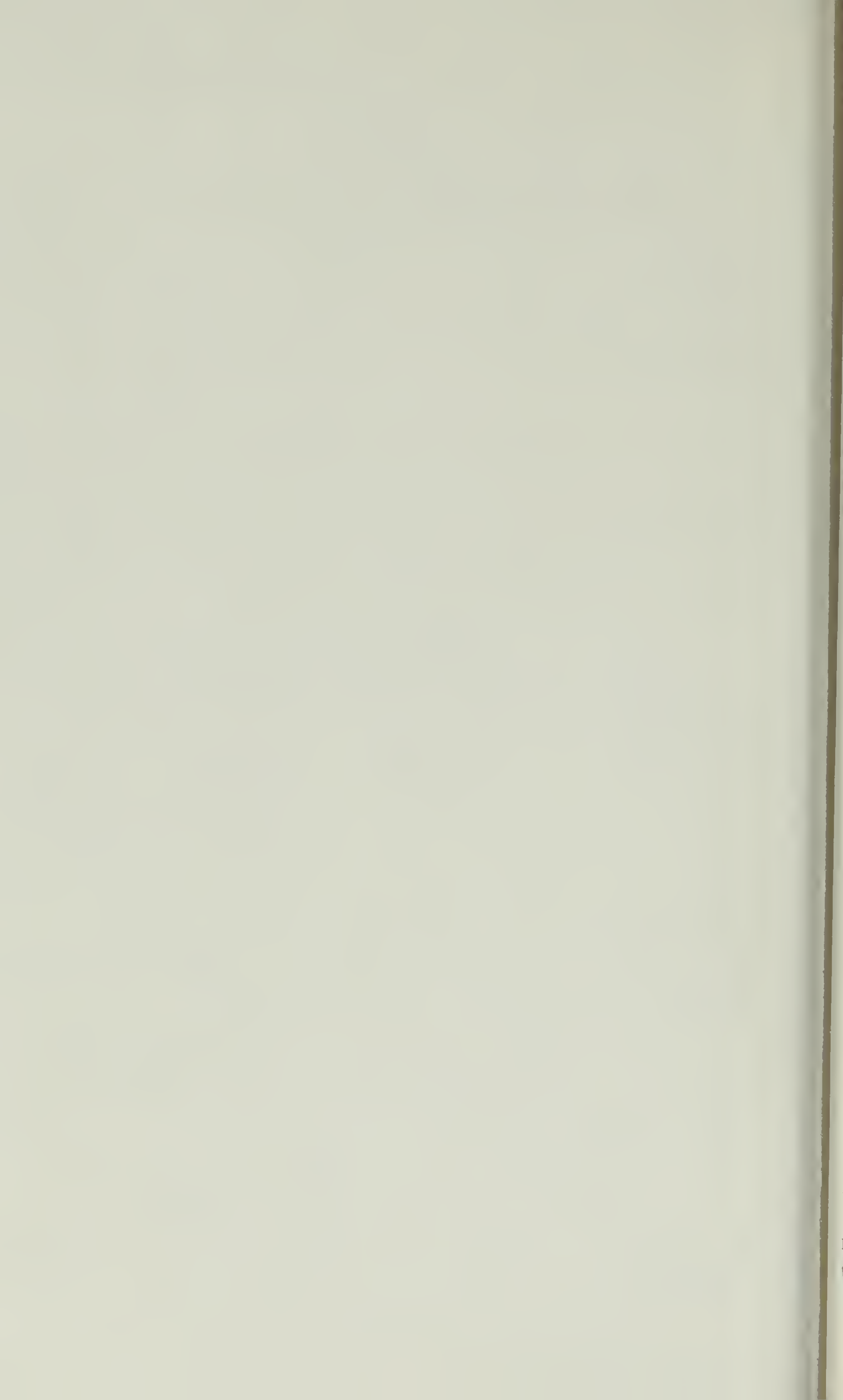

In the United States Court of Appeals for the Ninth Circuit

No. 13676

Commissioner Of Internal Revenue, petitioner

v.

Bear Film Co., a Corporation, respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Tax Court (R. 185–199) is reported at 18 T. C. 354.

JURISDICTION

The petition for review (R. 200–202) [1] involves a deficiency in corporate income taxes for the taxable year 1945 in the amount of $25,376.20 (R. 206–207). A notice of deficiency was mailed to taxpayer on May 22, 1950 (R. 165, 169, 182). Taxpayer filed a petition for redetermination with the Tax Court on July 28, 1950 (R. 163, 165–181), under the provisions of Section 272 of the Internal Revenue Code. The decision of the Tax Court, sustaining in part and overruling in part the Commissioner's deter-

[1] This Court approved a stipulation providing that a single joint record be printed in the instant case and the related case of *Vincent* v. *Commissioner* (Docket No. 13649), now pending on review before this Court (R. 208–209). Separate briefs will be written in the cases.

mination of deficiency, was entered July 24, 1952 (R. 199–200). The case is brought to this Court by a petition for review filed by the Commissioner on October 14, 1952 (R. 200–202), pursuant to the provisions of Section 1141 (a), Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

Whether the sum of $61,000 paid by taxpayer pursuant to a state court decree construed by the Tax Court as having effected a "compound novation", represented, as held by the Tax Court, additional compensation for services rendered which was deductible by taxpayer for the year 1946 under Section 23 (a) (1) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

Sec. 23. Deductions from gross income.

In computing net income there shall be allowed as deductions:

(a) [as amended by Sec. 121 (a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

(1) *Trade or Business Expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * *.

* * * * *

(26 U. S. C. 1946 ed., Sec. 23.)

Sec. 41. General rule.

The net income shall be computed upon the basis of the taxpayer's annual accounting period

(fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; * * *. * * *

* * * * *

(26 U. S. C. 1946 ed., Sec. 41.)

Sec. 43. Period for which deductions and credits taken.

The deductions and credits (other than the corporation dividends paid credit provided in section 27) provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred," dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. * * *

(26 U. S. C. 1946 ed., Sec. 43.)

Sec. 48. Definitions.

When used in this chapter—

(a) *Taxable Year.*—"Taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part. * * *

* * * * *

(c) *"Paid or Incurred," "Paid or Accrued."*—The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this Part.

* * * * *

(26 U. S. C. 1946 ed., Sec. 48.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.43-1. *"Paid or Incurred" and "Paid or Accrued."*—(a) The terms "paid or incurred" and

"paid or accrued" will be construed according to the method of accounting upon the basis of which the net income is computed by the taxpayer. (See section 48 (c).) * * *

* * * * *

STATEMENT

The facts have been stipulated (R. 183–185) and, as stipulated and found by the Tax Court (R. 187–194), may be summarized as follows:

Taxpayer (sometimes hereinafter referred to as Bear) is a California corporation which kept its books and filed its returns on an accrual basis. One Oscar Hansen was president of Bear from the time of its incorporation until his death, intestate, in 1929, and owned all the stock of that corporation consisting of 2,500 shares of preferred and 2,500 shares of common stock (R. 1878–18).

Oscar Hansen and his wife separated in 1920 and were divorced in 1922. In 1920 Oscar's wife and daughter Virginia (taxpayer in *Vincent* v. *Commissioner*, Docket No. 13649, now pending on review before this Court) went to live in Michigan where Virginia continued to reside until 1940 when she returned to California. At some time prior to 1945, Virginia remarried and became known as Virginia Hansen Vincent (referred to herein as Virginia) (R. 187–188).

Upon the death of her father in 1929, Virginia, then 13 years old, was his sole surviving heir. Other survivors were his mother, Josephine Hansen, and his brothers, Albert and Charles Hansen. Oscar Hansen was close to his mother and lived with her after he was separated from his wife (R. 188).

During 1926 and 1927, Oscar Hansen conveyed all his stock in Bear to his mother, Josephine, as trustee, in

trust, for himself as beneficiary of the trust. He never at any time revoked or changed the terms of the trust and in fact, and at law, was the beneficial owner of all of the preferred and common stock of Bear, and Josephine had a bare legal title thereto. Upon his death, Josephine concealed the fact that she held the bare legal title as trustee, and the stock was not included in the assets of the estate of Oscar Hansen, of which Josephine was one of the administrators (R. 188).

After Oscar's death, a brother Albert was pursuaded by the mother, Josephine, to resign from the faculty of Purdue University and to manage the business of Bear. In 1929, Albert was elected president and a director of the corporation, and thereafter managed the business of Bear until his death in 1940 (R. 188–189).

In 1930, Josephine assigned all the preferred and common stock of Bear to Albert, who, in turn, transferred some of the stock to a trust for the benefit of his son Robert. Upon the death of Albert, the rest of the stock was held in trust for the benefit of his wife, Alice Hansen, and their children, Robert and Florence (R. 189).

After the death of Oscar, dividends in the total amount of $95,000 were declared on all of Bear's stock, but only $61,000 thereof was paid. The payments were made in various amounts from December 31, 1937, to August 13, 1941, to Albert and his estate (R. 189).

Bear also paid Albert a salary for his services as president and manager which aggregated $81,210.09 during his lifetime (R. 189).

In August, 1940, Virginia, daughter of Oscar, filed suit in the Superior Court for the County of San Francisco against Bear, the executrix of Albert Hansen's estate, and

others, for the recovery of all the stock of Bear, and for other relief. The suit was instituted upon the basis of information which led her to believe that she was the lawful owner of all of the Bear stock, and a decision of the Superior Court in her favor was entered on July 2, 1943.[2] In 1946, the Supreme Court of California affirmed [3] the decision of the Superior Court which then became final (R. 189–190). The findings of fact, conclusions of law (R. 19–110), and judgment (R. 111–114) of the Superior Court were received in evidence by the Tax Court in the instant proceeding and were incorporated by reference in the findings of the Tax Court (R. 190).

Insofar as material, and in substance, the Superior Court concluded and held (1) that at the time of his death, Oscar Hansen was the equitable owner of all of the Bear stock, and that Virginia, as his sole heir, became the equitable owner thereof (R. 108, 112, 190); (2) that (a) Bear held, as trustee, for Virginia 500 shares of its common and 500 shares of its preferred stock, which formerly stood in the name of Albert Hansen and which were transferred by him to it in 1939 in trust for his son Robert Carmody Hansen, and (b) that Alice Carmody Hansen, as executrix of the estate of Albert Hansen, held 2,000 shares each of the common and preferred stock of Bear as trustee for Virginia (R. 108, 112, 190). The Superior Court further found Albert Hansen could not have honestly believed that Josephine Hansen owned the stock involved and that he was possessed of knowledge, which put him, as a prudent man, on inquiry as to the real ownership of the stock, and further that he held the

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[2] The opinion of that court is not officially reported.

[3] Reported as *Hansen* v. *Bear Film Co.*, 28 Cal. 2d 154, 168 P. 2d 946.

bare legal title to the stock subject to the claims of the true owner (R. 49–50, 51, 190–191). Nevertheless, that court found that Albert Hansen gave up his professional career to assume the management of Bear, that he had performed his duties with skill and ability, and that he had increased the business and more than doubled its value and worth (R. 51–52, 77, 90, 92–93, 191). The Superior Court also found that the reasonable value of Albert Hansen's services to the corporation for the entire period during which he rendered services was not less than $81,210.09, the compensation he had been paid, plus $61,000, or a total of $142,210.09 (R. 107–108, 191).

In addition, the Superior Court directed Bear and the estate of Albert Hansen to transfer the legal title of all of the preferred and common stock of Bear to Virginia and to make delivery of the stock to her. That court also decreed that Virginia recover judgment against Bear for the sum of $61,000 principal, "representing dividends declared and paid on the foregoing stock subsequent to April 26, 1929, together with interest thereon" in the sum of $17,676.09: that "all right on the part of any person to recover for dividends declared but not paid (including all credits now appearing on the books of said corporation for said unpaid dividends) shall be cancelled and all such dividends shall be cancelled"; and that Bear "is not entitled to, and it shall be decreed that it may not demand, attempt to collect or recover from the defendants or any of them the whole or any part of the sums heretofore paid Albert A. Hansen or his estate as or on account of dividends" (R. 108–109, 112–113).

In 1946, Bear paid the judgment "insofar as it ran against" itself; the amounts paid included $61,000 paid pursuant to paragraph 6 of the order of the California

Superior Court (R. 184). That paragraph provided, in part, that Virginia "do have and recover judgment against Bear Film Co. for the sum of $61,000.00 principal, representing dividends declared and paid on the foregoing stock subsequent to April 26, 1929, * * *" (R. 113).

Bear sustained a net operating loss for the year 1946 and was entitled to a loss carryback to the year 1945 under Section 122 of the Code. The Commissioner reduced the amount of the net operating loss for 1946, which resulted in a corresponding reduction of the amount of the loss carryback deduction in 1945. This reduction resulted in part from the disallowance, as a business expense deduction for 1946, of the $61,000 paid pursuant to the judgment of the Superior Court (R. 179). Accordingly, the Commissioner determined a deficiency in Bear's income tax for 1945 in the total amount of $25,376.20 (R. 169, 186).

On petition for review filed by Bear with the Tax Court, one of the issues involved related to the deductibility under Section 23 (a) (1) (A) of the Code, of the sum of $61,000 payment of which, as stated above, was made by Bear during 1946 pursuant to the decree of the California court (R. 186–187). The Tax Court held, upon the basis of its interpretation (R. 146–147, 195–196) of the decree and orders of the Superior Court that, in 1946, Bear "for the first time discharged its obligation to pay an additional $61,000 compensation for the services of Albert Hansen, deceased." Accordingly, the Tax Court found and held that Bear incurred and paid a business expense in the amount of $61,000 in 1946 with respect to which it was entitled to a business expense deduction under Section 23 (a) (1) (A) of the Code (R. 191–192, 195–196).

STATEMENT OF POINTS TO BE URGED

The statement of points which are relied upon by the Commissioner as the basis for the proceeding are set forth at pages 206–207 of the printed record. In substance they are that the Tax Court erred in its finding and conclusion that taxpayer was entitled to a business expense deduction with respect to the payment by it of the sum of $61,000 which it construed as representing payment of compensation for services.

SUMMARY OF ARGUMENT

The petition for review of the decision of the Tax Court in the instant case was filed for protective purposes in the event that this Court should reject the theory on which the Tax Court decided the issue presented in the case of *Vincent* v. *Commissioner*, *infra*, now pending on review before this Court. It is the position of the Commissioner that the decision herein is correct and that it should, except for the eventuality mentioned, be affirmed.

ARGUMENT

The issue involved in this appeal is related to one of the issues in the case of *Vincent* v. *Commissioner* (Docket No. 13649), now pending on review before this Court. Both issues arise from the same basic facts, consisting of the findings of fact, conclusions of law, and judgment of the Superior Court of California in and for the City and County of San Francisco (R. 17–114), which were stipulated as facts in both the instant case and the case of *Vincent* v. *Commissioner*, *supra* (R. 14, 183–184). The stipulated facts were accepted and found as facts by the Tax Court in each of the related cases (R. 126, 187).

The decision of the Tax Court in each of the cases was

based upon its interpretation of the decree and orders of the California Superior Court which it construed to mean (R. 146–147, 195–196) that Albert's estate was obligated in 1946 to make restitution to Virginia of $61,000 dividends improperly received by the estate or by Albert; that in 1946 Bear became obligated to pay additional compensation for Albert's services in the amount of $61,000, and that a "compound novation" was effected by the decree of the court whereby Bear discharged the obligation of Albert's estate to make restitution of $61,000 accumulated dividends to Virginia, thereby satisfying its obligation to pay the estate for Albert's compensation, $61,000.

Under the judgment of the Superior Court, Virginia recovered, during the taxable year 1946, 5,000 shares of Bear stock, having a value of $305,850, $61,000 in cash, representing dividends, and $63,082 in cash, representing interest (R. 133–134). She did not include in her income for 1946, however, the sum of $61,000 which Bear paid her pursuant to the decree of the Superior Court, contending, as the Tax Court stated (R. 145), "* * * that the sum in question represents damages and that it is, therefore, not taxable as income under section 22 (b) (5)." The Commissioner, on the other hand, determined that this sum represented dividends on the Bear stock, and, accordingly, that it was taxable income under Section 22 (a) of the Code (R. 139–140).

Following its interpretation of the judgment of the California court, the Tax Court sustained the Commissioner in his determination that the sum of $61,000, received by Virginia in 1946, represented "accumulated dividends" owed to her by the estate of Albert, and there-

fore was taxable as income to her under Section 22 (a) of the Code (R. 147).

Correspondingly, the Tax Court held that in 1946 Bear "for the first time discharged its obligation to pay an additional $61,000 compensation for the services of Albert Hansen", or to state it differently, Albert's estate constructively received in 1946 $61,000 compensation for Albert's services and his estate made restitution of $61,000 dividends to Virginia through Bear under the novation which was effected by the Superior Court's order. Accordingly, the Tax Court found and held that Bear incurred and paid a business expense in the amount of $61,000 in 1946 with respect to which it was entitled to a business expense deduction under Section 23 (a) (1) (A) of the Code, *supra* (R. 191–192, 195–196).

It is obvious, as pointed out by the Tax Court (R. 146), that by its judgment the California Supreme Court devised a way of obviating a suit by Bear against the estate of Albert Hansen to recover dividends improperly paid by finding that he had rendered services having a value of $61,000 in excess of what Bear had paid to him as salary or compensation for services, so that what had been paid by Bear to Albert Hansen or his estate as dividends was to be deemed to have been additional payment of compensation for his services, with the result that Bear was ordered to pay $61,000 to Virginia as dividends. As further pointed out by the Tax Court (R. 146), these orders of the Superior Court also eliminated the formal steps of a payment of additional compensation by Bear to the Albert Hansen estate, the return of erroneously paid dividends by the estate to Bear, and the payment of the

dividends by Bear to Virginia, all obligations involving the same amount, namely, $61,000.

It is the position of the Commissioner that the Tax Court correctly decided both the instant case and also that of *Vincent* v. *Commissioner*, *supra*. The petition for review of the decision in the instant case was filed for protective purposes only in the event that, upon review of the decision of the Tax Court in the *Vincent* case, this Court should reject the theory on which the Tax Court decided that case and formulate a new and different theory which might change the tax consequences with respect to Bear. In such an eventuality, the Commissioner was and is of the opinion that, since the tax questions in both cases arise from the same factual situation, the decision of the Tax Court in the instant case should be kept open for review by this Court.

CONCLUSION

The decision of the Tax Court herein is correct and, except for the eventuality above mentioned, should be affirmed.

Respectfully submitted.

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June, 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953

No. 13,676

IN THE

United States Court of Appeals

For the Ninth Circuit

Commissioner of Internal Revenue, *Petitioner,* vs. Bear Film Co., a corporation, *Respondent.*	

On Review of The Tax Court of the United States.

BRIEF FOR THE RESPONDENT.

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FILED
JUL 1953

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No. 13,676

IN THE

United States Court of Appeals
For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,* vs. BEAR FILM CO., a corporation, *Respondent.*	

On Review of The Tax Court of the United States.

BRIEF FOR THE RESPONDENT.

STATEMENT AS TO JURISDICTION.

This case was instituted by a petition filed in The Tax Court of the United States within ninety days of the date on which the deficiency letter was mailed to the respondent (R. 163, 165-182). Decision of the Tax Court was entered on July 24, 1952, finding a deficiency in income tax for the year 1945 in the amount of $622.09 (R. 164, 199-200). On October 14, 1952, the Commissioner of Internal Revenue filed a petition for review by this Court and served notice thereof on the respondent (R. 164, 200-204). The jurisdiction of this Court is founded on Sections 1141 and 1142 of the Internal Revenue Code.

STATEMENT OF THE CASE.

The facts have been stipulated (R. 17-114, 183-185) and as stipulated and found by the Tax Court (R. 187-194) may be summarized as follows:

Respondent is a California corporation, having its principal office and place of business in San Francisco, California (R. 165, 182, 187). It is on the accrual and calendar year basis (R. 183, 187).

Prior to 1929, respondent's president and sole shareholder, Oscar Hansen, had placed his stock in trust with his mother, Josephine Hansen (R. 26-40, 98-102, 188). In 1929, Oscar Hansen died intestate, leaving his daughter, Virgina Hansen (referred to hereinafter by her married name, Virginia Hansen Vincent), as his sole heir. Josephine Hansen was appointed co-administrator of his estate. (R. 19-20, 52, 188.)

Immediately on her son's death, Josephine Hansen assumed control and asserted full ownership of the stock of respondent that had been transferred to her in trust, in violation of her duty as a trustee of the stock and as administratrix of her son's estate (R. 47-48, 52-53, 99-102, 188). Later in 1929, she persuaded her son, Albert Hansen, to give up his career as a member of the faculty of Purdue University to come to San Francisco to take over management of the company. Albert Hansen was elected president of respondent and became a director, filling the position vacated on the death of Oscar Hansen, his brother. (R. 48-49, 188-189.) During this period, respondent more than doubled its worth through Albert Hansen's efforts in building up and increasing its business (R. 92-93, 191). From 1929 until his death in 1940, Albert Hansen managed

the business of respondent and was paid a salary by respondent for his services during this period of $81,210.09 (R. 49, 107, 189).

In 1929 Josephine also assigned all of the stock of respondent to Albert Hansen, who in 1939 transferred some of the stock to respondent in trust for his son, Robert Carmody Hansen. The remainder of the stock stood in Albert Hansen's name, or, after his death, in the name of his estate. (R. 28-29, 35-36, 189.) During this period, 1929-1941, respondent declared dividends on its stock in the amount of $95,000, and paid to Albert Hansen or his estate as such dividends the sum of $61,000. These payments were actually made in various amounts between December 31, 1937 and August 13, 1941. (R. 189.)

In 1940, after Albert Hansen's death, Virginia Hansen Vincent learned that she was the rightful owner of all of respondent's stock and commenced suit in the California Superior Court against respondent, Albert's estate and others for its recovery and for related relief. Judgment was entered for her on July 2, 1943, and was affirmed by the Supreme Court of California on May 7, 1946, in *Hansen v. Bear Film Co.,* 28 Cal. 2d 154, 168 P. 2d 946. (R. 14, 61-62, 189-190.)

The judgment awarded Virginia Hansen Vincent all of the stock of respondent and, insofar as it ran against respondent, provided as follows: (a) respondent was ordered to pay certain sums of money to her, including $61,000 principal, representing dividends declared and paid on the stock after April 26, 1929, together with interest of $17,676.09; and (b) respondent was ordered to turn over

to her that part of the stock held by it as trustee for Robert Carmody Hansen. Other material parts of the judgment provided that all unpaid dividends previously declared by respondent should be cancelled and that respondent should not demand or recover the $61,000 previously paid to Albert Hansen or his estate as dividends. (R. 111-114, 190-191.) In 1946, respondent paid the judgment against itself to Virginia Hansen Vincent (R. 184, 192).

In reaching its judgment, the Superior Court found that Virginia Hansen Vincent was the owner of the stock of respondent and that Albert Hansen and his estate had no right thereto (R. 49-51, 190-191). The Superior Court also found that Albert Hansen had been the president and a director of the respondent at all times from May 24, 1929 until his death; that from March 12, 1930 to his death, Albert had controlled the entire board of directors; that all of the actions of the board of directors and all of the policies of respondent during this period had been dictated and determined by him alone; that he had given up an honorable and remunerative career in the field of teaching and scientific writing as a member of the faculty of Purdue University in order to take these positions with respondent; and that his efforts, diligence, skill, thrift, enterprise and ability had built up and had increased the business of respondent and had more than doubled its value and its worth. (R. 51-52, 77, 90, 92-93, 191.) As a result, the Superior Court found that the reasonable value of Albert's services to respondent during this period was not less than the sum of the compensation paid to him by respond-

ent, $81,210.09, and the amount previously paid to him and his estate as dividends, $61,000 (R. 107-108, 191).

Respondent, in determining the amount of its net operating loss for 1946, deducted the sum of $61,000 lost by it under the above judgment. This net operating loss was carried back under Section 122 of the Internal Revenue Code to offset income realized in 1945. However, the Commissioner reduced the amount of the 1946 loss available as a carryback by disallowing the deduction in 1946 of the $61,000. Accordingly, the Commissioner determined a 1945 deficiency against respondent of $25,376.20. (R. 169-181, 186.)

On petition for review of the deficiency determination, the Tax Court overruled the Commissioner on this point to hold that the sum of $61,000 was properly deducted by respondent in 1946 as additional compensation paid to Albert Hansen under Section 23(a)(1)(A) of the Internal Revenue Code. Consequently, the Tax Court reduced the amount of the deficiency for 1945 to $622.09.[1] (R. 187-192, 194-196, 199-200.)

The Commissioner sought review of the decision of the Tax Court, but in his opening brief he has conceded that "the decision herein is correct" and that his review is filed merely "for protective purposes in the event that this Court should reject the theory on which the Tax Court decided the issue presented in the case of *Vincent v. Commissioner* * * *" (R. 200-202, Op. Br. 9).

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[1]The latter amount involves issues which are not here on review.

SUMMARY OF ARGUMENT.

As found by the Tax Court below, the payment of $61,000 by respondent in 1946 represented additional compensation paid by respondent to Albert Hansen, its former president, for services previously rendered by him. Although the payment itself was made to Virgina Hansen Vincent, it was by way of compound novation, discharging Albert Hansen's obligation to pay Virginia Hansen Vincent $61,000 as accumulated dividends in return for a release of respondent's liability to pay $61,000 to the estate of Albert Hansen. Alternatively, respondent lost in 1946 a cause of action formerly held by it to recover $61,000 in accumulated dividends previously paid to Albert Hansen and his estate. The only consideration for the cancellation by the judgment of this cause of action was the simultaneous cancellation of Albert Hansen's right to recover $61,000 as additional compensation from respondent. In either event, the payment or the cancellation of indebtedness represented a deductible amount as a business expense under Section 23(a)(1)(A) of the Internal Revenue Code.

The deduction, being contested until judgment became final in 1946 and payment being made in that year, was properly taken in 1946 under Section 43 of the Internal Revenue Code. Accordingly, the Tax Court was correct in allowing respondent to deduct the sum of $61,000 in 1946 and its decision should be affirmed.

ARGUMENT.

I. UNDER THE PROVISIONS OF INTERNAL REVENUE CODE SEC. 23(a)(1)(A), WHICH AUTHORIZES DEDUCTIONS FOR COMPENSATION PAID FOR SERVICES, RESPONDENT PROPERLY DEDUCTED THE SUM OF $61,000 PAID UNDER THE JUDGMENT.

Under Section 23(a)(1)(A) of the Internal Revenue Code, respondent was entitled to deduct in the year 1946 "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered * * *."[2] The record shows that respondent paid the amount of $61,000 in 1946 and that Albert Hansen had rendered personal services to the respondent of a value greater than the salary previously received by him. This discrepancy between the compensation previously paid and the value of his services was equal to at least $61,000 (R. 184, 191-192). The payment in 1946 by respondent was not made directly to the estate of Albert Hansen, but was made to Virginia Hansen Vincent in satisfaction of her judgment. However, the Tax Court found that the payment was in fact a payment for the benefit of the estate of Albert Hansen in consideration of his past services (R. 191-192). This finding was reached by the court after a careful scrutiny of the findings and decision of the Superior Court of California. That scrutiny revealed the presence of two obligations both for the same amount, $61,000:

---

[2]As amended by §121(a), Revenue Act of 1942, c. 619, 56 Stat. 798; for a more complete text, see Op. Br. 2.

(1) The obligation of the estate of Albert Hansen to pay Virginia Hansen Vincent the amount of dividends wrongfully received by it and by Albert Hansen on the embezzled stock;

(2) The obligation of respondent to pay the estate of Albert Hansen the same sum as additional compensation for services rendered by him.

Since the two obligations were for the same amount, the Tax Court held that the payment by respondent of $61,000 to Virginia Hansen Vincent effected a compound novation discharging both obligations. The payment by respondent was, therefore, the equivalent of a payment to the estate of Albert Hansen for Albert's prior services and a payment by the estate to Virginia of the dividends. (R. 195-196.)

Consequently, the Tax Court properly found that, as far as respondent is concerned, the payment was compensation for services rendered, deductible in 1946 as a business expense under Section 23(a)(1)(A).

The finding and decision of the Tax Court on this point are supported by law and by the evidence before the court. The fact that respondent first incurred the obligation to pay for Albert's services in a taxable year after the services were performed is immaterial; that fact does not bar the deduction for compensation in the year paid. *Lucas v. Ox Fibre Brush Co.,* (1930) 281 U.S. 115.

Nor does the fact that the payment to the estate of Albert Hansen was by way of discharging its obligation to Virginia Hansen Vincent affect the validity of this

deduction. Compensation may be paid in many forms. Payment of an employee's tax liability may be deductible compensation. *Old Colony Trust Co. v. Commissioner,* (1929) 279 U.S. 716. A profit to an employee traceable to an option granted by the employer may be compensation. *Commissioner v. Smith,* (1945) 324 U.S. 177. An annuity contract purchased by the employer for the employee may be compensation. *Crispin v. United States,* (CA 9, 1952) 200 F. 2d 99. The cancellation of an employee's indebtedness may be compensation. Reg. 111, Sec. 29.22(a)-13; *Taylor-Logan Co. v. White,* (CA 1, 1933) 65 F. 2d 994.

Alternatively, the deduction for compensation may be justified by reference to a third obligation which appears in the judgment of the Superior Court. That judgment, *inter alia,* provided that the obligation of Albert Hansen and his estate *to return to respondent* the $61,000 previously paid by it as dividends be cancelled (R. 113, 195). If any consideration was received by respondent for this cancellation of a debt owing to it, that consideration could only be the equivalent cancellation of respondent's obligation to the estate of Albert Hansen to pay $61,000 for his prior services. As pointed out *supra,* compensation may be paid in many forms; the cancellation of an employee's debt to the employer under circumstances similar to these was held to be deductible as compensation. *Taylor-Logan Co. v. White, supra;* Reg. 111, Sec. 29.22(a)-13, *supra.*

It is submitted, therefore, that the $61,000 payment or loss by respondent in 1946 was properly held by the Tax

Court to be deductible as compensation for services rendered.

II. THE DEDUCTION FOR COMPENSATION WAS PROPERLY ACCRUED AND TAKEN BY RESPONDENT IN 1946.

Under Section 43, Internal Revenue Code,[3] the respondent, being on the accrual basis, was entitled to take its deductions for compensation paid in the year when "paid or accrued." Prior to 1946, respondent had contested its liability to pay the sum of $61,000 and had refused to pay that amount until the decision of the Supreme Court of California on appeal was entered on May 7, 1946. Thereafter, during the same taxable year of 1946, respondent paid the sum as required by the judgment. The deduction, therefore, was properly taken in 1946. *Dixie Pine Products Co. v. Commissioner,* (1944) 320 U.S. 516; *Security Flour Mills Co. v. Commissioner,* (1944) 321 U.S. 596.

Therefore, it is submitted, the Tax Court was correct in permitting the contested payment to be deducted in 1946, when respondent's liability therefor became final and the amount was paid.

CONCLUSION.

It is therefore submitted that the judgment should be affirmed. The Commissioner of Internal Revenue does not argue to the contrary. In his conclusion, the Commissioner states:

[3]For text, see Op. Br. 3.

"The decision of the Tax Court herein is correct and, except for the eventuality above mentioned, should be affirmed." (Op. Br. 12.)

The "eventuality above mentioned" is the fear of the Commissioner that this Court will reject one of the theories upon which the Tax Court predicated its decision in *Vincent v. Commissioner,* now pending on review before this Court (Docket No. 13649).

That this concern of the Commissioner is entirely groundless is readily apparent from a perusal of the issues and record of the *Vincent* case, *supra.*[4] That case has been presented to this Court by Virginia Hansen Vincent, as petitioner, seeking a reversal of the Tax Court's decision entering a deficiency of 1946 income taxes against her of $52,088.81 (Vincent R. 154). Petitioner therein advances three separate grounds for reversal, any one of which is sufficient to invalidate the decision below. Moreover, *none* of the arguments advanced on behalf of petitioner in the *Vincent* case is inconsistent in any respect with the decision of the Tax Court herein. No argument made therein denies that the payment of $61,000 to Vir-

[4]We regret the necessity of complicating this case by describing and developing the issues presented in the *Vincent* case, *supra,* but we believe it is necessary in order to answer an implication of the Commissioner that a reversal of the *Vincent* case in favor of the taxpayer will necessitate a reversal of the present case in favor of the Commissioner (see Op. Br. 12). The positions of the two separate taxpayers in the two cases are not inconsistent, and a victory for one should have no effect on the merits of the questions raised by the other. This is a conclusion that we believe must spelled out in detail herein, at the risk of unduly complicating and lengthening this brief, in order to prevent the erroneous opinion of the Commissioner to the contrary from prejudicing the meritorious case of either of the taxpayers.

ginia Hansen Vincent represents "accumulated dividends," as found by the Tax Court herein. This is the point upon which the Commissioner apparently fears an inconsistency (see Op. Br. 10-11), but his fears are without foundation in fact.

Neither the first nor second ground for reversal in the *Vincent* case involves the status or classification of the $61,000 payment made by respondent to Virginia Hansen Vincent. Both the first and second grounds for reversal in the *Vincent* case involve Mrs. Vincent's right to deduct the entire amount she spent in recovering her judgment, and no question concerning the $61,000 payment is raised in them. (See Vincent, Pet. Op. Br. 10-48.)

The third independent ground justifying reversal of the *Vincent* case is entitled, "The payment of $61,000 received by petitioner under the judgment was not taxable income to her in 1946." The argument thereunder (see Vincent, Pet. Op. Br. 48-53) accepts the fact found by the Tax Court that the payment of $61,000 to Virginia Hansen Vincent in 1946 represented "accumulated dividends." (*Id.* at 48-49.) The argument is made, not on the ground that the payment was something else than accumulated dividends, but on the basis that the accumulation did not constitute taxable income to Virginia in 1946.

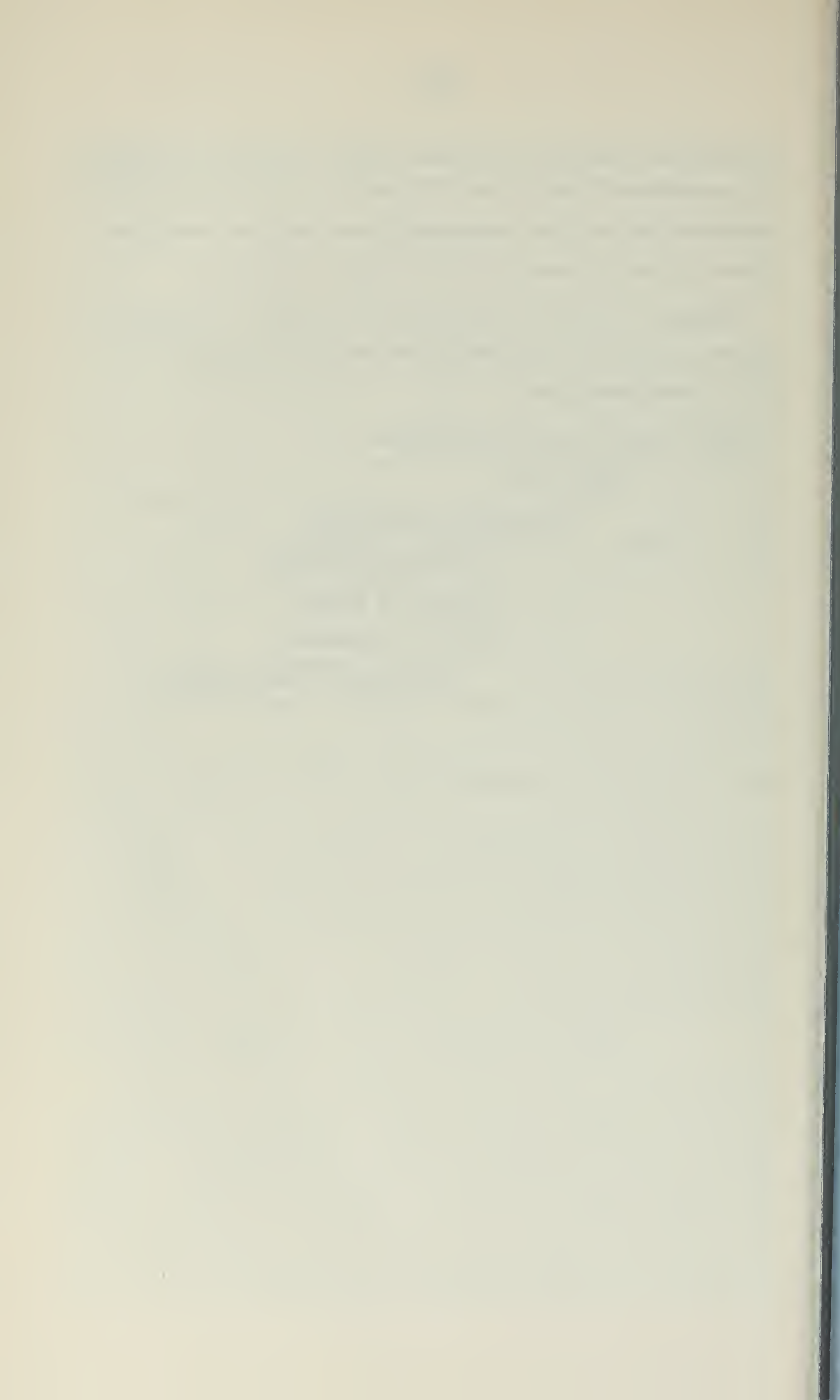
Therefore, no inconsistency exists between the positions urged by the taxpayers in the two cases. Since the "eventuality" envisioned by the Commissioner in his Opening Brief herein has not come to pass, we believe that it is incumbent upon him to dismiss his appeal in the present case, for he advances no meritorious contention of law or

fact for this Court to examine and to rule upon. Neither the interests of justice nor of judicial administration will be served by further prolonging the "protective appeal" taken by the Commissioner in this proceeding.

Whether or not the Commissioner decides to dismiss his appeal, it is clear the decision of the Tax Court is correct and should be affirmed.

Dated, San Francisco, California,
July 6, 1953.

Respectfully submitted,
VALENTINE BROOKES,
ARTHUR H. KENT,
PAUL E. ANDERSON,
Attorneys for Respondent.



No. 13677

United States
Court of Appeals
for the Ninth Circuit.

SEVERO RUIZ CHAVEZ, Also Known as CAYETANO MENDEZ,

Appellant,

vs.

JAMES McGRANERY, as Attorney General of the United States, and H. R. LANDON, as District Director of Immigration at Los Angeles,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillps & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-20-53

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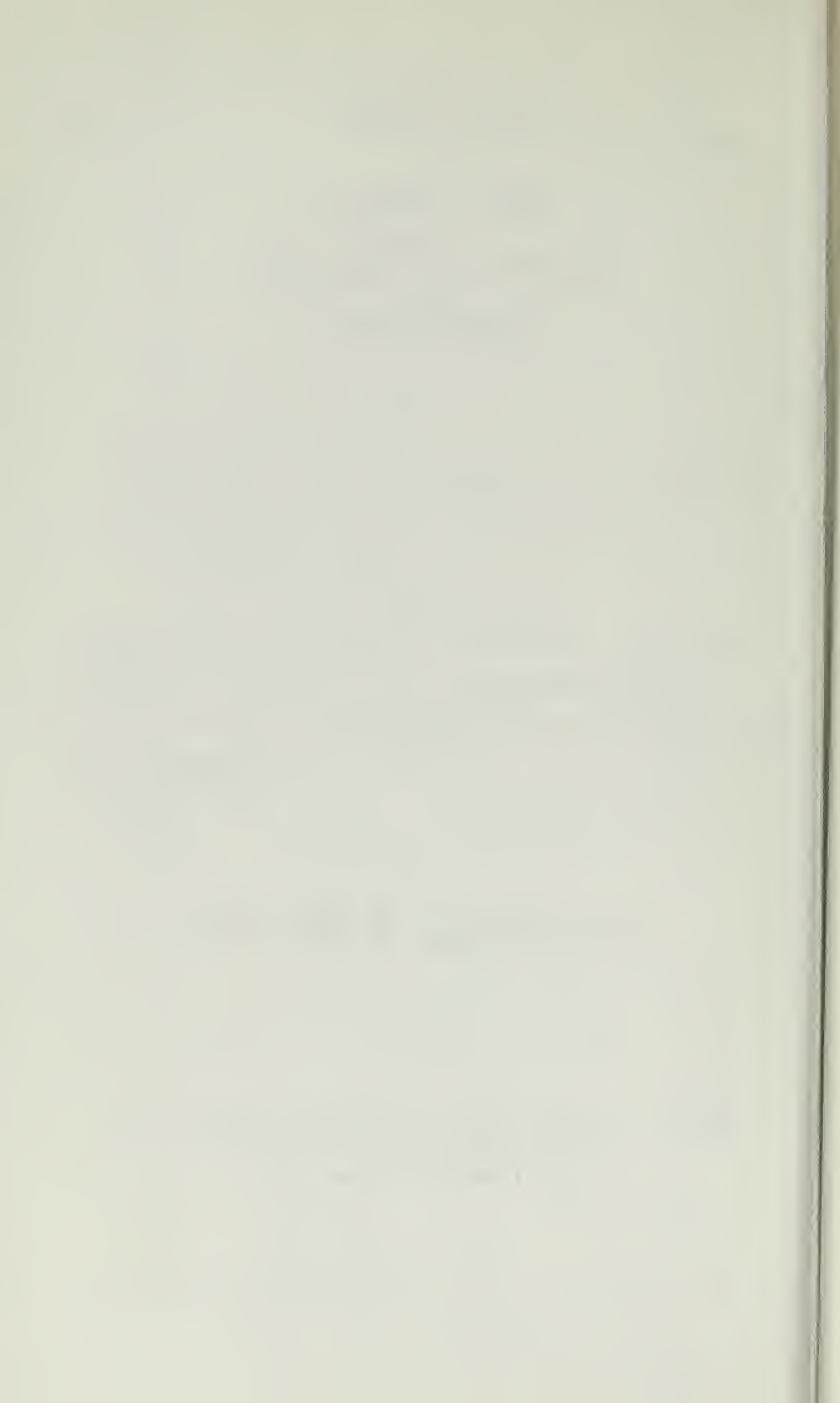

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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United States Attorney;

CLYDE C. DOWNING,
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600 Federal Bldg.,
Los Angeles 12, Calif.

United States District Court, Southern District of California, Central Division

Civil Action No. 14,301-WB

In the Matter of

The Petition of SEVERO RUIZ CHAVEZ, Also Known as CAYETANO MENDEZ,

Petitioner,

vs.

JAMES McGRANERY, as Attorney General of the United States, and H. R. LANDON, as District Director of Immigration at Los Angeles,

Respondents.

PETITION FOR JUDICIAL REVIEW OR HABEAS CORPUS

To the Honorable District Court of the United States, Southern District of California, Central Division:

The petition of Severo Ruiz Chavez respectfully recites:

I.

Petitioner is a native and citizen of the Republic of Mexico.

II.

On September 20, 1947, a warrant of arrest was issued by the Department of Justice, Immigration and Naturalization Service, charging petitioner with having entered the United States at El Paso, Texas,

on or about December 20, 1938, in violation of the Immigration Act of May 26, 1924, in that at the time of his entry [2*] he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said act or regulations made thereunder.

III.

That said warrant of arrest was served upon your petitioner on the 17th day of October, 1947, and thereafter proceedings were held under said warrant of arrest on July 12, 1950, before said Immigration Service at Los Angeles, California.

IV.

That petitioner testified substantially at said hearing that he was born at Hidalgo, state of Jalisco, Republic of Mexico, on the 21st day of February, 1918. That his father, a citizen of the Republic of Mexico, resided in the state of California and died in Los Angeles County. That petitioner last entered the United States on or about November 18, 1938, near the port of El Paso, Texas; that at the time of his entry he was not in possession of an immigration document, visa, passport, or other travel document, which permitted him to enter and remain permanently in the United States. That petitioner at no time since November 13, 1938, departed from the United States, nor was he ever arrested or deported, but has been a continuous resident of the United States since said November 13, 1938. Petitioner was married in the Republic of Mexico in

***Page numbering appearing at foot of page of original Reporter's Transcript of Record.**

1934. His wife is a citizen of the Republic of Mexico. At the time of said hearing, he had been separated from his wife for more than ten years. One child was born as the result of this marriage, who is residing with his mother in the Republic of Mexico.

Petitioner further testified that he was employed at Altadena in restaurant work on a percentage basis; that he had a couple of arrests for intoxication and paid a fine therefor. Petitioner further testified that he did not serve in the armed forces of the Republic of Mexico; that he served in the armed forces of the [3] United States of America. His honorable discharge from the Army of the United States on March 18, 1943, was presented and read into the record. There was offered in behalf of the petitioner and received in evidence his draft registration certificate showing that he was registered for military service on July 1, 1941, by Local Board 188, Pasadena, California; that except for the time of his service in the armed forces, petitioner lived and resided in the county of Los Angeles, state of California, since the year 1938 continuously. Petitioner registered under the Alien Registration Act of 1940 and for selective service under the military training act of 1938.

That during the said proceedings, petitioner was advised by the Hearing Officer of his right to apply for suspension of deportation on the grounds of his seven years' continuous residence in the United States and proof of good moral character for the

period of five years. Petitioner thereupon made application, which application was accepted for the privilege of suspension of deportation and the discretion granted under the statutes in full force and effect. That thereafter said matter was continued for hearing August 22, 1950, at which time petitioner appeared and the following proceedings took place:

There was submitted on behalf of petitioner and filed in the proceedings a formal application for suspension of deportation (Form I-55) as Exhibit 3. The affidavits of Edgar E. Brandin and Stella M. Falkenberg were introduced on behalf of the Petitioner as Exhibits 4 and 5, attesting to the good moral character of the petitioner for more than five years preceding the commencement of said proceedings. There was further introduced on behalf of the petitioner his employment record for more than five years.

Petitioner further testified that he was contributing toward the support of his wife and child in the Republic of Mexico; that [4] he had not lived with his wife since 1938 and had not heard from her since that time. Petitioner further testified that he received a medical discharge from the army of the United States.

There was introduced in evidence on behalf of the petitioner the investigation report of the Government indicating no adverse record of petitioner of good moral character during the preceding five years. Petitioner further testified that he had never

received any public aid, charity or assistance; that he was a member of the A. F. of L. and C. I. O. Unions and was never a member of any organization which advocated the overthrow of the Government of the United States by force or violence. He testified that he was willing to again serve in the armed forces of the United States and that he was in accord with the democratic principles of the United States. He further testified that his property consisted of a 1941 automobile, cash and a stock of food at his place of employment.

The matter having been submitted, the Hearing Officer determined on the 3rd day of January, 1951, that the petitioner (1) is an alien, a native and citizen of Mexico; (2) that his only entry into the United States occurred on or about November, 1938, at El Paso, Texas; (3) that at the time of entry petitioner intended to work and remain in the United States permanently; (4) that at the time of entry he was not in possession of an immigration visa.

The Hearing Officer further determined as a conclusion of law that the petitioner was subject to deportation on the ground that at the time of entry he was an immigrant not in possession of a valid immigration visa.

The Hearing Officer further determined (1) that the petitioner was not ineligible for naturalization; (2) that he has been a person of good moral character for the past five years; (3) that [5] he has resided in the United States continuously for at least the past seven years; (4) that he was residing in

the United States on July 1, 1948; that there has been no evidence developed in the proceedings to establish that the petitioner was deportable under any of the grounds specified in section 19(d) of the Immigration Act of 1917.

As Conclusions of Law as to Discretionary Relief, the Hearing Officer determined that the petitioner meets the statutory requirements for eligibility for suspension of deportation pursuant to section 19(c) (2) (b) of the Immigration Act of 1917, as amended, and that he meets the statutory requirements for eligibility for voluntary departure pursuant to section 19(c) (1) of the Immigration Act of 1917, as amended. The Hearing Officer did thereupon recommend that petitioner be required to voluntarily depart from the United States.

Thereafter the Immigration Board of Appeals ordered that the order of deportation be not entered but that petitioner be required to depart from the United States.

That thereafter a further petition was made to the Immigration Board of Appeals for a consideration of petitioner's right to suspension of deportation, and on the 19th day of October, 1951, the said Board of Immigration Appeals entered an order requiring petitioner to depart from the United States with the proviso that deportation be effected if the alien did not avail himself of such required departure. That said order is now in effect and petitioner's departure must be effected on or before July 2, 1952, otherwise the deportation of petitioner will be effected pursuant to said order.

V.

That the hearings before the said Immigration Service, which resulted in the order requiring petitioner's departure from the United States were not held pursuant to the Administrative Procedure Act in full force and effect during the proceedings, in that [6] pursuant to section 11 of said act, the Hearing Officer conducting said hearing was never legally, duly, lawfully or regularly appointed pursuant to said act, and, therefore, said hearings were conducted in violation of law.

VI.

That said Immigration Service, in conducting said hearings and in denying petitioner's request for suspension of his deportation, acted arbitrarily, capriciously and unwarranted. The Hearing Officer during the course of said proceedings and in conducting the same acted in violation of law; that the decision of said Hearing Officer in recommending an order requiring petitioner's departure from the United States was arbitrary, capricious and unwarranted.

VII.

The decision of said Hearing Officer was contrary to the facts and the law, capricious and in violation of petitioner's rights to a fair and impartial hearing.

VIII.

Petitioner was denied procedural due process of law, in that the Hearing Officer conducting said

hearings was not lawfully and legally appointed according to law to conduct said hearings.

IX.

That the act of said Immigration Service in failing to grant petitioner the discretionary relief provided by statute, 8 U.S.C.A. sec. 155, Aliens & Nationality, as amended by Public Law 863, 80th Congress, Ch. 783:

"(c) In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart from the United States to any other country of [7] his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; * * *"

and the failure to suspend his deportation, was capricious, arbitrary and unwarranted and a violation of said section as aforesaid and the discretion vested in said Immigration Service by said section.

X.

The acts of the said Immigration Service by its said Director of Immigration and those acting under

his orders as aforesaid were in violation of the rules and regulations of said Service, promulgated to safeguard the constitutional rights of persons subject to the Immigration laws of the United States.

XI.

Petitioner herein respectfully requests a judicial review under the Administrative Procedure Act (5 U.S.C.A., sec. 1009), which provides in part as follows:

The pertinent portions of section 10 of the Act, 5 U.S.C.A., sec. 1009, are:

> "Except so far as (1) statutes preclude Judicial review * * *
>
> "(a) Any person suffering legal wrong because of any agency action * * * shall be entitled to judicial review thereof.
>
> "(b) The form of proceeding for judicial review shall be any special statutory review proceeding * * * or, in the absence thereof, any applicable form of [8] legal action * * *
>
> * * *
>
> "(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review, any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subjected to review upon the review of the final agency action. * * *"

It is further provided by section 10, sec. 1009(e) (B) of the Act that the Court upon review shall "hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. * * *"

XII.

That petitioner herein is not held by virtue of any warrant, indictment, information or other legal process.

XIII.

That said order of said Immigration Service is vague, indefinite and uncertain in that it does not designate any place to which the alien is to be deported.

Wherefore, petitioner prays:

(1) That citation issue against respondents James McGranery, Attorney General of the United States, and H. R. Landon, District Director of Immigration at Los Angeles, to show cause before this Court why said proceedings resulting in the enforced voluntary departure of petitioner from the United States, should not be annulled.

(2) For a judicial review of the administrative process of said Immigration Service.

(3) For any appropriate writ, citation or order of this Court [9] concerning the hearings, processes, procedure and practice of said Immigration Service and its District Director and officers, or, in the

alternative, for a writ of habeas corpus directed to said Immigration Service commanding them to be and appear before this Honorable Court concerning the restraint of petitioner, and

(4) For such other orders or citations which may be proper and commensurate with the foregoing petition.

/s/ DAVID C. MARCUS,
Attorney for Petitioner.

Duly verified.

[Endorsed]: Filed July 2, 1952. [10]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR DISMISSAL

To the Plaintiff Above Named and to David C. Marcus, His Attorney:

You, and Each of You, Will Please Take Notice that the above-named defendants, by and through the undersigned, will bring the following Motion for Dismissal under Rule 12 (b) (2), (3), (4), (5) and (7), F.R.C.P., on for hearing before the above-entitled Court in the Courtroom of the Honorable William M. Byrne, United States District Judge, in the United States Post Office and Courthouse, Los Angeles, California, on Monday, the 6th day of October, 1952, at 9:45 o'clock in the forenoon of that

day, or as soon thereafter as counsel can be heard.

Dated at Los Angeles, California, this 25th day of September, 1952.

WALTER S. BINNS,
United States Attorney.

CLYDE C. DOWNING,
Asst. U. S. Attorney,
Chief, Civil Division.

/s/ ROBERT K. GREAN,
Asst. U. S. Attorney,
Attorneys for Respondents.

[Title of District Court and Cause.]

MOTION FOR DISMISSAL UNDER RULE 12 (b) (2), (3), (4), (5) and (7), FEDERAL RULES OF CIVIL PROCEDURE

Come now the defendants above named and appearing specifically for the purpose of this motion for dismissal and reserving all objections to the jurisdiction of this Court, by and through their attorneys, Walter S. Binns, United States Attorney for the Southern District of California; Clyde C. Downing and Robert K. Grean, Assistants United States Attorney for the Southern District of California, and move the Court for dismissal of the within action, pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure, on the following grounds: lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency

of service of process and failure to join an indispensable party.

This motion is based and will be presented upon the complaint of the plaintiff filed herein and upon the Memorandum of Points and Authorities in Support of Motion for Dismissal attached hereto.

WALTER S. BINNS,
United States Attorney.

CLYDE C. DOWNING,
Asst. U. S. Attorney,
Chief, Civil Division.

/s/ ROBERT K. GREAN,
Asst. U. S. Attorney,

Attorneys for Respondents.

Affidavit of service by mail attached.

[Endorsed]: Filed September 25, 1952. [13]

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

Petitioner has filed a petition which he denominates "Petition for Judicial Review or Habeas Corpus," naming the Attorney General and the local District Director of Immigration as respondents.

The material allegations of the petition may be summarized as follows: Petitioner is a native and citizen of the Republic of Mexico, born February 21, 1918, at Hidalgo, Mexico; petitioner last entered the

United States on or about November 18, 1938, near the port of El Paso, Texas; at the time of his entry he was not in possession of an immigration document, visa, passport or other travel document which permitted him to enter and remain permanently in the United States; he has resided in the United States continuously ever since; petitioner was married in the Republic of Mexico in 1934; he has one child as a result of this marriage; his wife and child reside in Mexico; at a hearing pursuant to a warrant of arrest issued in 1947 by the Department of Justice, Immigration and Naturalization Service, having been advised of his right to do so, the [20] petitioner made application for the privilege of suspension of deportation under the discretion granted to the Attorney General by section 155(c), Title 8 U.S.C.A.; petitioner's application was accepted and a hearing granted; it was determined that petitioner is a citizen of Mexico subject to deportation on the ground that at the time of entry he was an immigrant not in possession of a valid immigration visa; petitioner meets the statutory requirement for eligibility for voluntary departure pursuant to 8 U.S.C.A. 155(c) (1), and for suspension of deportation pursuant to 8 U.S.C.A. 155(c) (2); an order was made granting petitioner the privilege of voluntary departure under the authority vested in the Attorney General by section 155(c) (1).

The petitioner further alleges that the failure to grant petitioner discretionary relief suspending his deportation, was capricious, arbitrary and unwarwanted and a violation of 8 U.S.C.A. 155, and "the

discretion vested in said Immigration Service by said section." (Note: Section 155 vests the discretion in the Attorney General.) It is further alleged that petitioner was denied procedural due process of law in that the hearing officer conducting said hearings was not lawfully and legally appointed according to law to conduct said hearings, and that his decision recommending an order requiring petitioner's voluntary departure from the United States was arbitrary, capricious and unwarranted. Petitioner prays that citation issue against the Attorney General and the District Director of Immigration to show cause before this Court why said proceedings should not be annulled.

The respondents have moved for a dismissal on the grounds of lack of jurisdiction of the person of the Attorney General, improper venue, insufficiency of process, insufficiency of [21] service of process and failure to join an indispensable party.

Respondents contend that this is a case where agency action may not be judicially reviewed because it is a case peculiarly committed to agency discretion, wherein the action is by section 155(c) of Title 8 committed to the discretion of the Attorney General, and cite the exception to the right to judicial review contained in 5 U.S.C.A. 1009, as follows:

> "Sec. 1009. Judicial review of agency action. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion."

The exception refers only to exercised discretion and does not mean that merely because a statute commits action to agency discretion, the right to judicial review does not exist to determine whether or not the discretion has been exercised. U. S. ex rel Adel vs. Shaughnessy, 183 F. 2d 371. The statute with which we are here concerned commits the exercise of discretion to the Attorney General. The Court may not, in a review of the agency action, substitute its discretion for that of the Attorney General, but where the petitioner has alleged he was denied procedural due process of law which deprived him of the exercise of the Attorney General's discretion, he is entitled to a hearing and judicial determination of that question. This right is derived, not from the statute, but from the Fifth Amendment to the Constitution of the United States, which prohibits a deprivation of liberty or property without due process of law. Bridges vs. Wixon, (C. A. 9); 144 F. 2d 927 (reversed on other grounds).

A decree requiring the Attorney General to exercise the discretion committed to him could only be effective if granted by a court with jurisdiction over his person. The Attorney General's residence is in the District of Columbia. This Court's process does not extend to the District of [22] Columbia and it cannot require his attendance here. It, therefore, has no jurisdiction over his person. Connor vs. Miller, 178 F. 2d 755.

We now come to the question of whether petitioner can proceed against the local District Director of Immigration alone, or whether the Attorney General is an indispensable party.

The petitioner contends that the Attorney General is not an indispensable party, and relies upon Williams v. Fanning, 332 U.S. 490, and Navarro v. Landon, 106 F. Supp. 73, decided by this Court on the authority of the Fanning case.

In the Navarro case the plaintiff alleged that he was a legal resident of the United States lawfully admitted to this country on an immigration visa as a non-quota immigrant for permanent residence; that an order for his deportation had been issued and the District Director threatened to deport him unless restrained by the Court. In the Navarro case the issue raised by the complaint was whether the plaintiff was a legal resident entitled to permanent residence. If the Court determined the issue in plaintiff's favor, the District Director would be ordered to desist in his efforts to disturb plaintiff in the enjoyment of his legal residence and the matter would be at an end. The decree would effectively grant the relief sought by the plaintiff without requiring the District Director's superior to do a single thing. Therefore, under the authority of the Fanning case, the District Director's superior was not an indispensable party.

The instant case is distinguishable in that the relief which the petitioner is seeking requires affirmative action on the part of the District Director's superior. There is no contention that petitioner is a legal resident of this country. On the contrary, he alleges that he entered [23] the United States illegally and that, as a deportable alien he is seeking

a grant of suspension of deportation. The Attorney General alone is vested with the discretionary power to grant suspension of deportation, and a decree which expended itself on the District Director as the only respondent before the Court could not grant the relief the petitioner is seeking. It follows that the Attorney General is an indispensable party. Williams vs. Fanning, supra; Daggs vs. Klein, (C. C. A.) 169 F. 2d. 174.

The motion to dismiss is granted.

Dated this 30th day of October, 1952.

/s/ WM. M. BYRNE,
United States District Judge.

[Endorsed]: Filed October 31, 1952. [24]

United States District Court, Southern District of California, Central Division

No. 14,301-WB Civil

In the Matter of

The Petition of SEVERO RUIZ CHAVEZ, Also Known as CAYETANO MENDEZ,

Petitioner,

vs.

JAMES McGRANERY, as Attorney General of the United States, and H. R. LANDON, as District Director of Immigration at Los Angeles,

Respondents.

JUDGMENT OF DISMISSAL

The motion of the respondents to dismiss the action on the grounds of lack of jurisdiction of the person of the Attorney General, improper venue, insufficiency of process, insufficiency of service of process and failure to join an indispensable party having been heard on October 20, 1952; the petitioner appearing by his attorney, David C. Marcus, Esquire, and the respondents appearing by United States Attorney Walter S. Binns, and Assistant United States Attorney Robert K. Grean, and the Court having filed a memorandum of decision holding that said motion to dismiss should be granted, and the Court being fully advised in the premises and good cause appearing therefor, it is hereby

Ordered, Adjudged and Decreed that the above-entitled action be, and it is hereby, dismissed for lack of jurisdiction of the person of the Attorney General and failure to join an indispensable party.

Dated this 31st day of October, 1952.

/s/ WM. M. BYRNE,
United States District Judge.

[Endorsed]: Filed October 31, 1952.

Docketed and entered October 31, 1952. [25]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the United States Attorney, to the Respondents Above Named and to the United States District Court, the Honorable William Byrne, Judge Presiding:

Please Take Notice that the petitioner above named hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment of the above-entitled Court entered on the 31st day of October, 1952, in the above-entitled matter.

Dated this 3rd day of November, 1952.

/s/ DAVID C. MARCUS,
Attorney for Petitioner.

Affidavit of service by mail attached.

[Endorsed]: Filed November 5, 1952. [26]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 29, inclusive, contain the original Petition for Judicial Review or Habeas Corpus; Notice of and Motion for Dismissal, etc.; Memorandum of Decision; Judgment of Dismissal; Notice of Appeal; Designation of Record on Appeal

and Order Extending Time to Docket Appeal, which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 29th day of December, A.D. 1952.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13,677. United States Court of Appeals for the Ninth Circuit. Severo Ruiz Chavez, Also Known as Cayetano Mendez, Appellant, vs. James McGranery, as Attorney General of the United States, and H. R. Landon, as District Director of Immigration at Los Angeles, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 31, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 13,677

SEVERO RUIZ CHAVEZ, Also Known as CAYETANO MENDEZ,

Petitioner and Appellant,

vs.

JAMES McGRANERY, as Attorney General of the United States, et al.,

Respondents and Appellees.

STATEMENT OF POINTS RELIED UPON

1. That the lower court was without authority to dismiss the petition.

Dated this 2nd day of March, 1953.

/s/ DAVID C. MARCUS,
Attorney for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed March 4, 1953.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

The above-named appellant hereby designates the following as the record on appeal in the above-entitled matter:

1. Petition for Judicial Review or Habeas Corpus.

2. Notice of Motion for Dismissal, etc.

3. Memorandum of Decision.

4. Judgment of Dismissal.

5. Notice of Appeal.

6. Statement of Points Relied Upon.

7. This Designation of Record on Appeal.

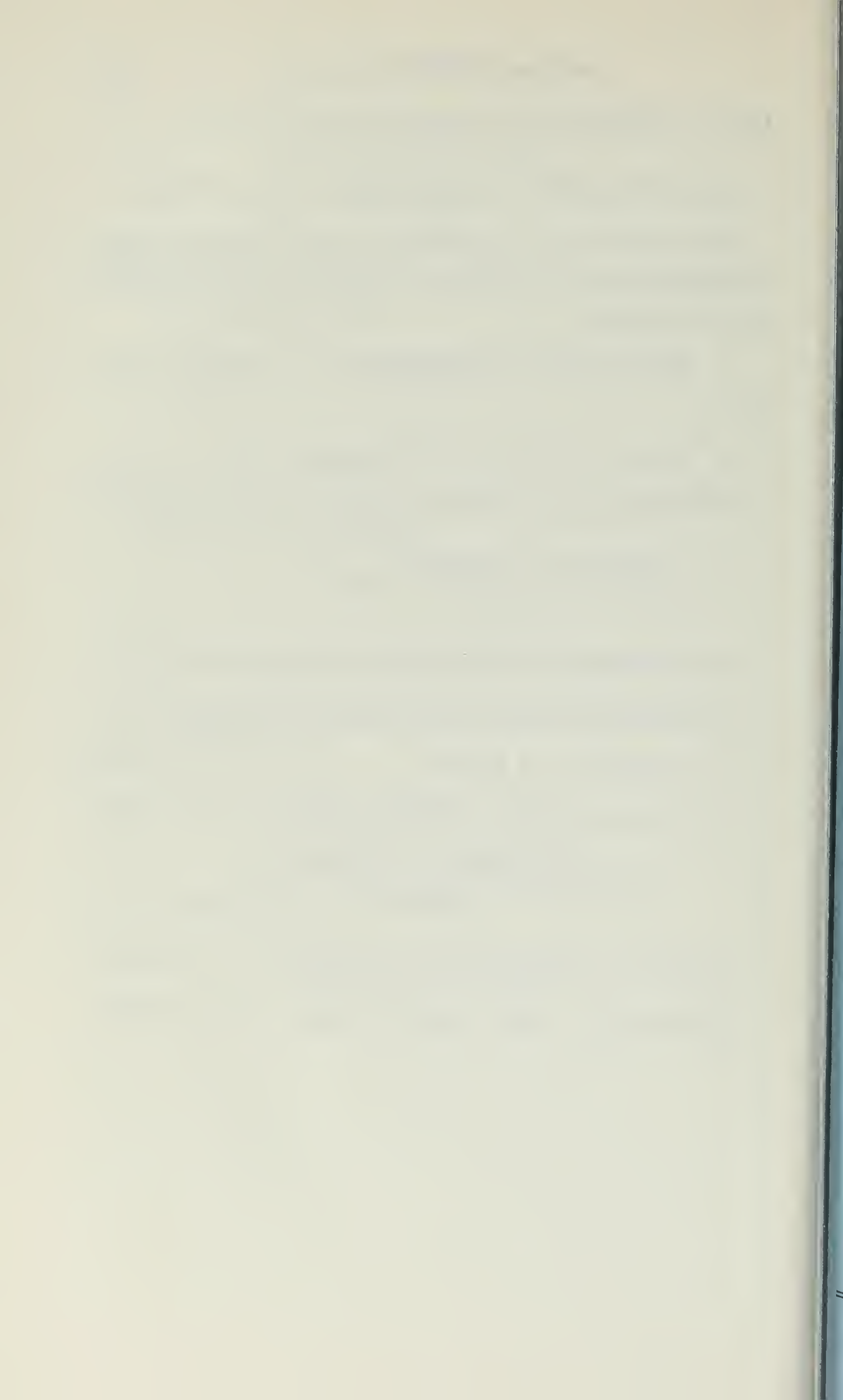
8. Certificate of Clerk.

Dated this 2nd day of March, 1953.

/s/ DAVID C. MARCUS,
Attorney for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed March 4, 1953.



No. 13679

United States Court of Appeals

For the Ninth Circuit.

JAMES EDWARD BROWN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Northern Division.

FILED

JUL 14 1953

PAUL P. O'BRIEN
CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—7-10-53

No. 13679

United States Court of Appeals

For the Ninth Circuit.

JAMES EDWARD BROWN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

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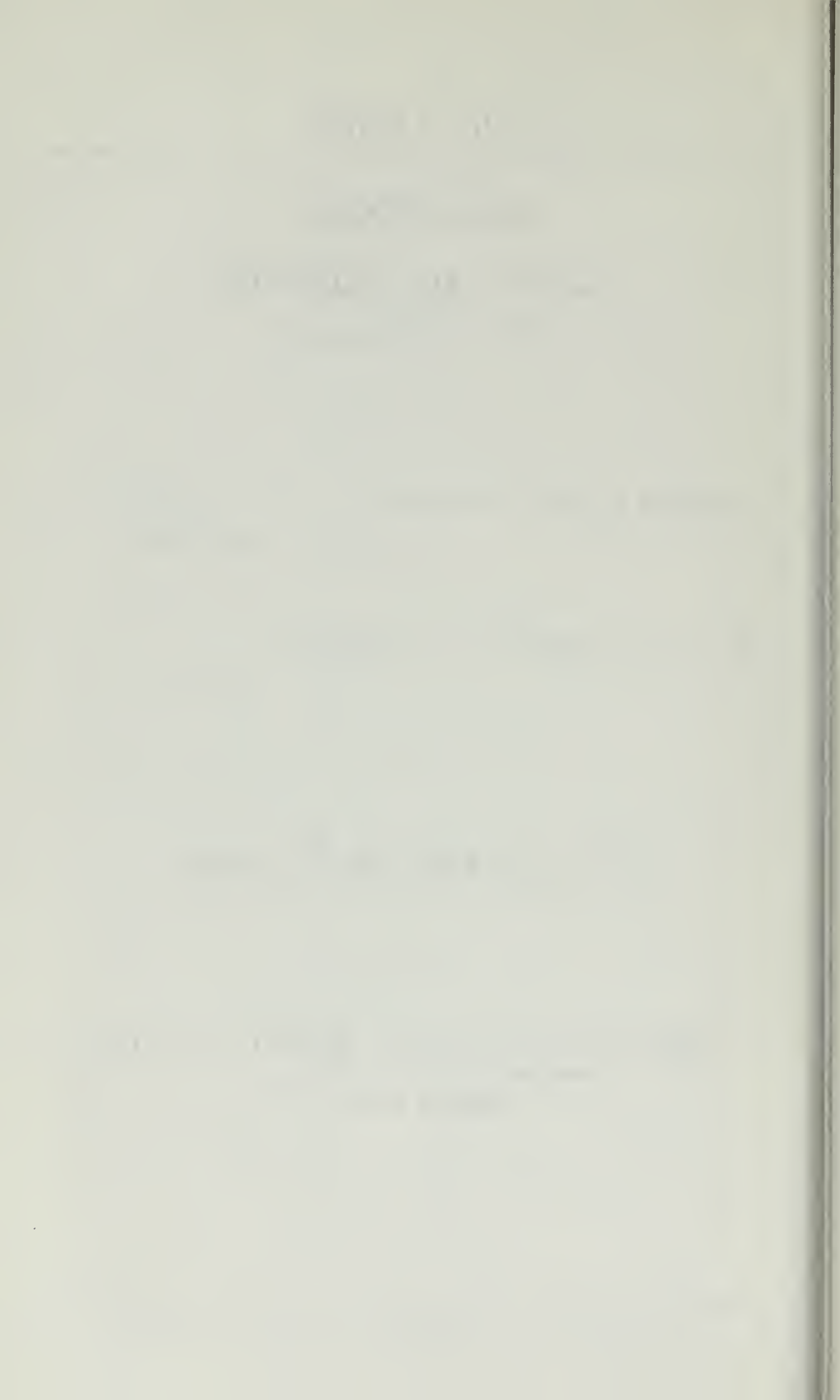
Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—7-10-53



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

JAMES EDWARD BROWN,

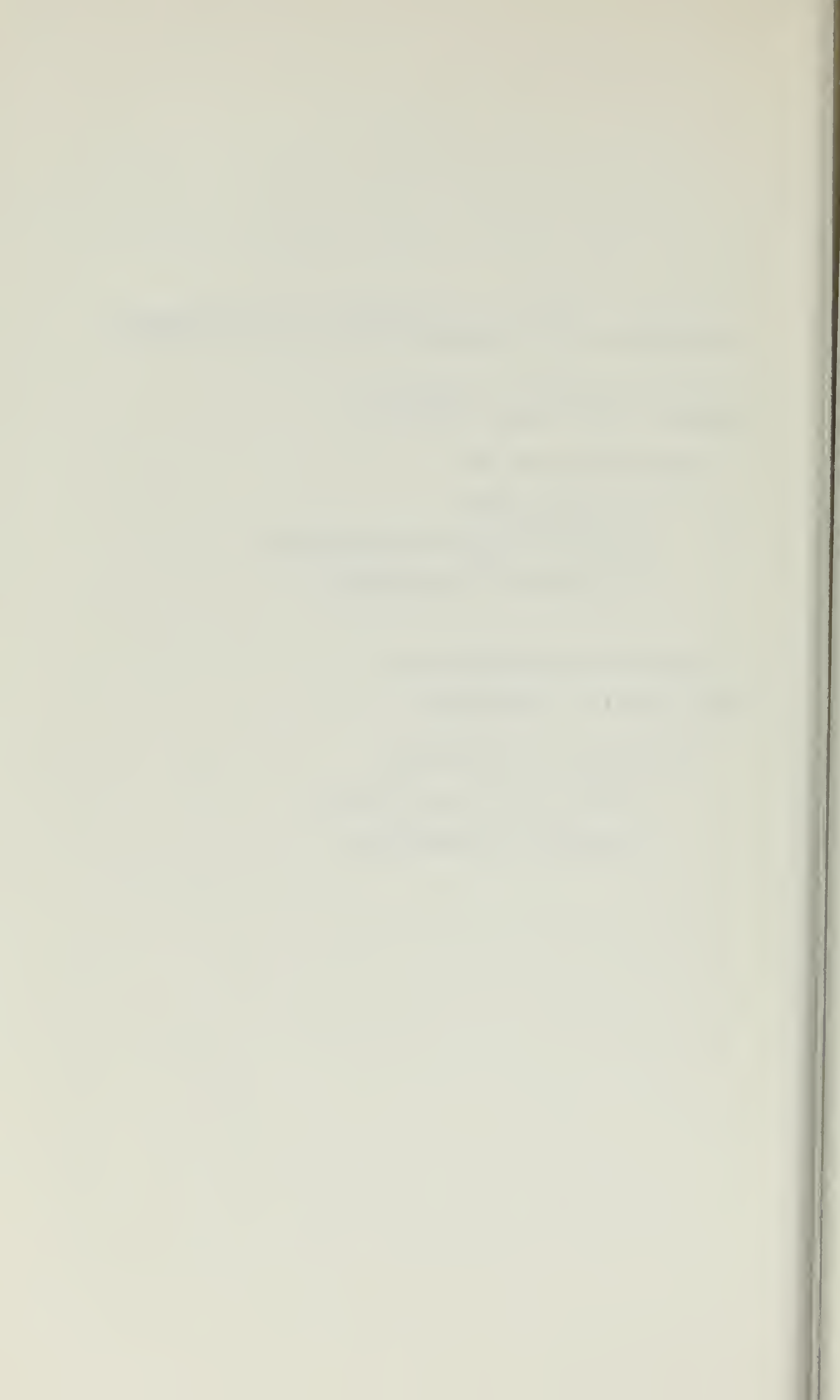
Appellant, per se.

Lock Box 500,
McNeil Island Penitentiary,
Steilacoom, Washington.

J. CHARLES DENNIS and
RICHARD D. HARRIS,

Attorneys for Appellee,

1017 U. S. Court House,
Seattle 4, Washington.



United States District Court, Western District
of Washington, Northern Division
No. 48568

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES EDWARD BROWN,
Defendant.

INDICTMENT

The Grand Jury charges:

Count I.

That on or about August 15, 1952, James Edward Brown did knowingly and unlawfully transport in interstate commerce, to wit, from Seattle, in the Northern Division of the Western District of Washington, to San Francisco, State of California, Della Mae Gilyard and Doris Ann Murray, female persons, for the purpose of prositution, debauchery and other immoral purposes.

All in violation of Title 18, U.S.C., Section 2421.

A True Bill.

/s/ S. CALDERHEAD,
Foreman.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ RICHARD D. HARRIS,
Asst. United States Attorney.

[Endorsed]: Filed September 26, 1952.

[Title of District Court and Cause.]

WARRANT FOR ARREST OF DEFENDANT

To any United States Marshal or any other authorized officer:

You are hereby commanded to arrest James Edward Brown and bring him forthwith before the District Court of the United States for the Western District of Washington in the city of Seattle, to answer to an Indictment charging him with

Did transport female persons, interstate commerce, for the purpose of prostitution, and other immoral purposes.

in violation of T 18, U.S.C., Sec. 2421.

Bail $7,500.00.

Date Sept. 26, 1952.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ SHELDON ELLIS,
Deputy Clerk.

Marshal's Return—received and executed Sept. 29, 1952.

[Endorsed]: Filed October 9, 1952.

[Title of District Court and Cause.]

MOTION TO HAVE U. S. MARSHAL SERVE DEFENDANT'S WITNESSES WITH SUBPOENAS

Comes now R. P. Guimont, attorney for defendant, James Edward Brown, and moves the court for an order requiring the U. S. Marshal to serve subpoenas on the following-named witnesses: Mrs. Odean, Room 39 at 2017½ 1st Ave., Byron Hotel, Seattle, Wash.; FBI Agent Bush, Federal Reserve Bank Bldg., Seattle, Wash.; Boyd Miles, 921-14th Ave., Seattle, Wash.; Sgt. Richardson, Fort Lawton, Wash., and Sharon Mae Wiley, 522 Mead St., Seattle, Wash., at the expense of the United States of America for and on the grounds that the defendant, James Edward Brown, has no funds with which to pay the costs or attorney fees in his defense and is a pauper. This motion is based upon the following affidavit.

/s/ R. P. GUIMONT,
Attorney for Defendant.

State of Washington,
County of King—ss.

R. P. Guimont, being first duly sworn on oath, deposes and says:

That on October 17, 1952, he was appointed by the Hon. John C. Bowen of the above-entitled court to defend the defendant, James Edward Brown. That affiant has been unable to obtain any funds from the defendant with which to maintain his

defense and the said James Edward Brown is without any funds on his person or in the custody of the U. S. Marshal with which to defray any expenses of his defense.

Further affiant sayeth not.

/s/ R. P. GUIMONT.

Subscribed and sworn to before me this 20th day of October, 1952.

[Seal] /s/ MERLIN K. BURGESS,
Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Filed October 21, 1952.

[Title of District Court and Cause.]

ORDER

This Matter having come on for hearing upon the motion of the defendant for an order requiring the issuance of subpoenas at the expense of the United States of Amercia, and the court being fully advised in the premises,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the Clerk of the U. S. District Court be and is hereby ordered to issue subpoenas to Mrs. Odean, Room 39 at 2017½ 1st Ave., Byron Hotel, Seattle, Wash.; FBI Agent Bush, Federal Reserve Bank Bldg., Seattle, Wash.; Boyd Miles, 921-14th Ave., Seattle, Wash.; Sgt. Richardson,

Fort Lawton, Wash., and Sharon Mae Wiley, 522 Mead St., Seattle, Wash., for them to be and appear as witnesses on behalf of the defendant, James Edward Brown, on the 28th day of October, 1952, at 2:00 p.m., at Room 710, U. S. Courthouse, Seattle, Washington, to be then and there a witness in the above-entitled cause, and the U. S. Marshal be and is hereby ordered to have said subpoenas served upon the parties therein named at the expense of the United States of America.

Done in Open Court this 21st day of October, 1952.

/s/ JOHN C. BOWEN,
Judge.

Approved and Presented by:

/s/ R. P. GUIMONT.

/s/ RICHARD D. HARRIS,
Asst. U. S. Atty.

[Endorsed]: Filed October 21, 1952.

[Title of District Court and Cause.]

MOTION FOR ORDER DIRECTING ISSUANCE OF WRIT OF HABEAS CORPUS AD TESTIFICANDUM

Comes now the plaintiff by J. Charles Dennis, United States Attorney, and Richard D. Harris, Assistant United States Attorney for the Western District of Washington, and moves the above-en-

titled Court for an order directingg the Clerk of the said Court to issue a Writ of Habeas Corpus Ad Testificandum directed to the Chief of Police, Tacoma, Washington, to produce before the above-entitled Court on the 29th day of October, 1952, the body of Willie Mae Braxton, alias Willie Mae Brown, for the purpose of testifying on behalf of the Government in the above-entitled cause.

This motion is based upon the records and files herein and upon the attached affidavit of Richard D. Harris, Assistant United States Attorney.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ RICHARD D. HARRIS,
Assistant United States Attorney.

United States of America,
Western District of Washington,
Northern Division—ss.

Richard D. Harris, being first duly sworn, on oath deposes and says:

That he is an Assistant United States Attorney for the Western District of Washington and as such makes this affidavit on behalf of the United States of America, plaintiff herein.

That Willie Mae Braxton, alias Willie Mae Brown, is now incarcerated as a prisoner in the City Jail at Tacoma, Washington; that it will be necessary to have said Willie Mae Braxton, alias Willie Mae Brown, present to testify as a witness

on certain material facts at the trial of the above-mentioned case before this Court on October 29, 1952.

[Seal] /s/ RICHARD D. HARRIS.

Subscribed and sworn to before me this 24th day of October, 1952.

/s/ LEE L. BRUFF,
Deputy Clerk, U. S. District Court, Western District of Washington.

[Endorsed]: Filed October 24, 1952.

[Title of District Court and Cause.]

ORDER DIRECTING ISSUANCE OF WRIT OF HABEAS CORPUS AD TESTIFICANDUM

Upon motion of the United States Attorney in the above-entitled cause for an order of this Court directing the issuance of a Writ of Habeas Corpus Ad Testificandum, requiring the Chief of Police, Tacoma, Washington, to produce the body of Willie Mae Braxton, alias Willie Mae Brown, on the 29th day of October, 1952, for the purpose of testifying on behalf of the Government in the above-entitled cause; and the Court being duly advised in the premises, Now, therefore,

It Is Hereby Ordered that the Clerk of this Court prepare and issue in the manner prescribed

by law, a Writ of Habeas Corpus Ad Testificandum directed to the Chief of Police, Tacoma, Washington, requiring him to deliver the said Willie Mae Braxton, alias Willie Mae Brown, who is now an inmate of the City Jail, Tacoma, Washington, on October 29, 1952, to the United States Marshal for the Western District of Washington, who is hereby ordered to produce her before the above Court at Seattle, Washington, October 29, 1952, at 9:30 a.m., to testify herein, and the Marshal is ordered to redeliver the custody of said Willie Mae Braxton, alias Willie Mae Brown, to the Chief of Police, Tacoma, Washington, when said Willie Mae Braxton, alias Willie Mae Brown, is discharged as a witness herein, and the United States Marshal is hereby authorized to incur the necessary expenses connected therewith, as provided by law.

Done in Open Court this 24th day of October, 1952.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented by:

/s/ RICHARD D. HARRIS,
Asst. United States Attorney.

[Endorsed]: Filed October 24, 1952.

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED INSTRUCTIONS

Presented by:

/s/ R. P. GUIMONT,
Attorney for Defendant.

Instruction No.——

You are instructed that before the defendant can be convicted of the crime charged herein, you must find that the defendant had an intention at the time of the departure of defendant and Della Mae Gilyard and Doris Ann Murray from the City of Seattle, to place said girls in a house of prostitution or to use them for the purpose of debauchery or other immoral purposes.

Instruction No.——

You are instructed that the defendant cannot be found guilty of the offense charged herein and your verdict should be that he is not guilty if you find that the interstate transportation of Della Mae Gilyard and Doris Ann Murray was not planned and made for the purpose of prostitution, debauchery and other immoral purposes.

Instruction No.——

You are instructed that incidental sexual intercourse, not the purpose of the trip, is not sufficient to warrant the conviction of the defendant herein, unless you find that the purpose of the trip was to

place Della Mae Gilyard and Doris Ann Murray in a house of prostitution or that the purpose of the trip was for debauchery or other immoral purposes.

[Endorsed]: Filed October 29, 1952.

[Title of District Court and Cause.]

PLAINTIFF'S REQUESTED INSTRUCTIONS

It is requested that the Court give instructions on the following subjects:

Presumption of Innocence
Intent
Evidence
Reasonable Doubt
Credibility
Statements by Counsel
Conclusion

Instruction No.——

The statute under which this defendant is charged reads as follows:

> "Whoever knowingly transports in interstate commerce * * * any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice" shall be punished.

To convict the defendant of this charge it will be necessary for you to find from the evidence, beyond a reasonable doubt, as follows:

1. That the defendant knowingly transported Della Mae Gilyard and Doris Ann Murray from Seattle, Washington, to San Francisco, California, and

2. That such transportation was for the purpose of prostitution or debauchery or other immoral purposes.

If you are convinced, beyond a reasonable doubt, as I will hereafter define that term for you, it will be your duty to convict, but if you do not so find from the evidence, it will be your duty to acquit.

Instruction No.——

If you find from the evidence that the witnesses Della Mae Gilyard and Doris Ann Murray were prostitutes or were persons who engaged in immoral practices, this finding by you is immaterial to the case, for you should not concern yourselves with whether or not they should be punished for violating the State law, inasmuch as that is a matter solely for the State authorities and over which this Court has no control and no jurisdiction. The only jurisdiction conferred upon the Federal Government is when a woman or a girl is transported in interstate commerce for the purposes about which you have hertofore been instructed. In other words, the basis of the Federal Government's jurisdiction is interstate commerce, and when that element is absent the Federal Government has no jurisdiction.

Instruction No.——

You are instructed that the Government need not prove that acts of prostitution actually occurred under the charge in this indictment, but it is sufficient for the Government to prove that the defendant intended that the victims in this case, to wit, Della Mae Gilyard and Doris Ann Murray, should engage in prostitution when they reached San Francisco, California, and whether or not Della Mae Gilyard or Doris Ann Murray did actually so engage themselves is not material to this charge.

Instruction No.——

In order for you to convict the defendant of the charge contained in the indictment, it is not necessary for the Government to prove, nor for you to find, that the defendant accomplished his purpose of having Della Mae Gilyard and Doris Ann Murray engage in prostitution, debauchery or other immoral practices after arriving in San Francisco, California, if you find, beyond a reasonable doubt, from all the evidence that that was the intent of the defendant prior to the commencement of the interstate journey.

It is sufficient if you find from the evidence, beyond a reasonable doubt, that the defendant persuaded, induced or coerced Della Mae Gilyard and Doris Ann Murray to go from Seattle, Washington, to San Francisco, California, for any one or more of these purposes, and if you do so find, it is your duty to convict the defendant.

[Endorsed]: Filed October 29, 1952.

[Title of District Court and Cause]

VERDICT

We, the jury in the above-entitled cause, find the defendant, James Edward Brown, is guilty to Count I as charged in the Indictment.

/s/ JOSEPH G. BENNETT,
Foreman.

[Endorsed]: Filed October 30, 1952.

United States District Court, Western District of Washington, Northern Division
No. 48568

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES EDWARD BROWN,
Defendant.

JUDGMENT, SENTENCE AND COMMITMENT

On this 31 day of October, 1952, the attorney for the Government and the defendant, James Edward Brown, appearing in person and being represented by R. Pat Guimont, his attorney, the Court finds the following:

That prior to the entry of his plea, a copy of the Indictment was given the defendant and the defend-

ant entered a plea of not guilty and a trial was held, resulting in a verdict of guilty as to Count I thereof; that by order of this Court the presentence investigation has been dispensed with; now, therefore,

It Is Adjudged that as to Count I the defendant, James Edward Brown, has been convicted by jury verdict and was found guilty of the offense of violation of Section 2421, Title 18, U.S.C., as charged in Count I of the Indictment, there being only one count in the Indictment herein, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged and Ordered that as to Count I the defendant, James Edward Brown, be committed to the custody of the Attorney General of the United States for confinement in the United States Penitentiary at McNeil Island, Washington, or in such other like institution as the Attorney General of the United States or his authorized representative may by law designate, for the period of Four (4) Years and Six (6) Months.

It Is Further Ordered that the Clerk of this court deliver a certified copy of this Judgment, Sentence and Commitment to the United States Marshal or other qualified officer, and that said copy serve as the commitment of the defendant.

Done in Open Court this 31st day of October, 1952.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented by:

/s/ J. CLARK DENNIS,
United States Attorney.

(Vio. White Slave Traffic Act.)

[Endorsed]: Filed October 31, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL.

Name and address of appellant: James Edward Brown, in custody.

Name and address of appellant's attorney: None.

Offense: That on or about August 15, 1952, James Edward Brown, did knowingly and unlawfully transport in interstate commerce, to wit, from Seattle, in the Northern Division of the Western District of Washington, to San Francisco, State of California, Della Mae Gilyard and Doris Ann Murray, female persons, for the purpose of prostitution, debauchery and other immoral purposes. All in violation of Title 18, U.S.C., Section 2421.

Concise statement of Judgment and Sentence: Judgment and Sentence entered October 31, 1952, adjudging that defendant had been convicted by jury verdict and is guilty of violation of Section 2421, Title 18, U.S.C., as charged in Count I of the Indictment, and sentencing defendant to confinement in the United States Penitentiary at McNeil Island, Washington, or in such other like institution as the Attorney General of the United States or his authorized representative may by law desig-

nate, for the period of Four (4) Years and Six (6) Months.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated Judgment and Sentence.

Dated, October 31, 1952.

/s/ JAMES EDWARD BROWN,
Appellant.

/s/ MILLARD P. THOMAS,
Witness.

[Endorsed]: Filed November 4, 1952.

[Title of District Court and Cause.]

WRIT OF HABEAS CORPUS AD TESTIFICANDUM

United States of America,
Western District of Washington,
Northern Division—ss.

The President of the United States of America.

To: The Chief of Police, City of Tacoma, Tacoma, Washington, Greetings:

In the name of the President of the United States of America, we command you to deliver the body of Willie Mae Braxton, alias Willie Mae Brown, a prisoner in your custody in the City Jail, Tacoma, Washington, to the United States Marshal for the the Western District of Washington, or his Deputy,

who is hereby directed to produce said Willie Mae Braxton, alias Willie Mae Brown, before the above Court at Seattle, Washington, on the 29th day of October, 1952, at the hour of 9:30 a.m. of said day, for the purpose of testifying as a witness in the above-entitled cause at the time and place aforesaid.

It is further ordered that the United States Marshal for the Western District of Washington, shall redeliver the custody of the said Willie Mae Braxton, alias Willie Mae Brown, to the Chief of Police, Tacoma, Washington, when the said Willie Mae Braxton, alias Willie Mae Brown, is discharged as a witness in the above-entitled cause, and the United States Marshal is hereby authorized to incur the necessary expenses connected herewith as provided by law.

Witness the Honorable John C. Bowen, Judge of the United States District Court for the Western District of Washington, and the Seal of said Court this 24th day of October, 1952.

MILLARD P. THOMAS,
Clerk, United States District Court, Western District of Washington.

By /s/ LOIS M. STOLSEN,
Deputy.

Received October 24, 1952.

[Endorsed]: Filed November 7, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 of the United States Court of Appeals for the Ninth Circuit and Rule 39(b)(1) of the Federal Rules of Criminal procedure, I am transmitting herewith all of the original papers in the file dealing with the above-entitled action and that said papers, (excluding Plaintiff's Exhibit 1 and Defendant's Exhibit A-1) constitute the record on appeal from the Judgment and Sentence of the Court filed Oct. 31, 1952, to the United States Court of Appeals for the Ninth Circuit, to wit:

1. Indictment, filed Sept. 26, 1952.
2. Marshal's Return on Bench Warrant, filed Oct. 9, 1952.
3. Praecipe for subpoena, Gilyard and two (2), filed Oct. 17, 1952.
4. Praecipe for Subpoenas, Wiley and four (4), filed Oct. 20, 1952.
5. Motion to have U. S. Marshal Serve Defendant's Witnesses with subpoenas, filed Oct. 21, 1952.
6. Order requiring the issuance of subpoenas at

the expense of the United States of America, filed Oct. 21, 1952.

7. Marshal's Return on Subpoena, Braxton, filed Oct. 22, 1952.

8. Praecipe for Subpoena duces tecum, Powell, filed Oct. 23, 1952.

9. Praecipe for Subpoena duces tecum, Ford, filed Oct. 23, 1952.

10. Motion for Order Directing Issuance of Writ of Habeas Corpus Ad Testificandum, filed Oct. 24, 1952.

11. Order Directing Issuance of Writ of Habeas Corpus Ad Testificandum filed Oct. 24, 1952.

12. Praecipe for Issuance of Two Certified Copies of the Order Directing Issuance of Writ of Habeas Corpus Ad Testificandum, filed Oct. 24, 1952.

13. Marshal's Return on Subpoenas, Gilyard and one, filed Oct. 29, 1952.

13-A. Defendant's Requested Intructions, filed Oct. 29, 1952.

13-B. Plaintiff's Requested Instructions, filed Oct. 29, 1952.

14. Marshal's Return on Subpoena duces tecum, Powell, filed Oct. 29, 1952.

15. Praecipe for Subpoena, Reynolds, filed Oct. 30, 1952.

16. Praecipe for Subpoena, Devine, filed Oct. 30, 1952.

17. Marshal's Return on Subpoena, Bush and two, filed Oct. 30, 1952.

18. Marshal's Return on Subpoena, Reynolds and one, filed Oct. 30, 1952.

19. Marshal's Return on Subpoena, Odean, not found, filed Oct. 30, 1952.

20. Marshal's Return on Subpoena, Wiley, not found, filed Oct. 30, 1952.

21. Order Directing Discharge from custody of Gilyard and Murray, as material witnesses, filed Oct. 30. 1952.

22. Verdict, filed Oct. 30, 1952.

23. Judgment, Sentence and Commitment, filed Oct. 31, 1952.

24. Marshal's Return on Subpoena, duces tecum, Ford, filed Nov. 3, 1952.

25. Notice of Appeal, filed Nov. 4, 1952.

26. Marshal's Return on Writ of Habeas Corpus Ad Testificandum, filed Nov. 7, 1952.

27. Letter from James Edward Brown to Hon. John C. Bowen, U. S. District Judge, filed Nov. 7, 1952.

28. Order directing United States Marshal shall pay the witnesses who appeared in court, their fees for attendance, filed Nov. 14, 1952.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparation of the record on appeal in this cause, to wit:

Notice of Appeal, $5.00, and that said amount has been paid to me by the appellant.

In Witness Whereof I have hereunto set my

hand and affixed the official seal of said District Court at Seattle, this 1st day of December, 1952.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 13679. United States Court of Appeals for the Ninth Circuit. James Edward Brown, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: January 5, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13679

JAMES EDWARD BROWN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL.

Pursuant to Rule 19(6) of this Court, the Appellant states and designates the entire and whole contents of the record is necessary for the appeal herein, and intends to rely on all the points set out in the assignment of errors, as well as those set forth hereinafter below:

1. Denial of effective assistance of Counsel.

2. Conflicting and perjurious testimony on the part of prosecution's witnesses.

3. Insufficient time in which to prepare defense.

4. Verdict was inconsistent with evidence and testimony.

The Appellant deems the entire record, as filed in the above-entitled cause, necessary for the consideration of the points relied upon.

/s/ JAMES EDWARD BROWN.

[Endorsed]: Filed June 3. 1953.

No. 13677

United States Court of Appeals

For the Ninth Circuit

SEVERO RUIZ CHAVEZ, Also Known as CAYETANO MENDEZ,
Appellant,

vs.

JAMES McGRANERY, as Attorney General of the United States, and H. R. LANDON, as District Director of Immigration at Los Angeles,
Appellees.

Appellant's Opening Brief

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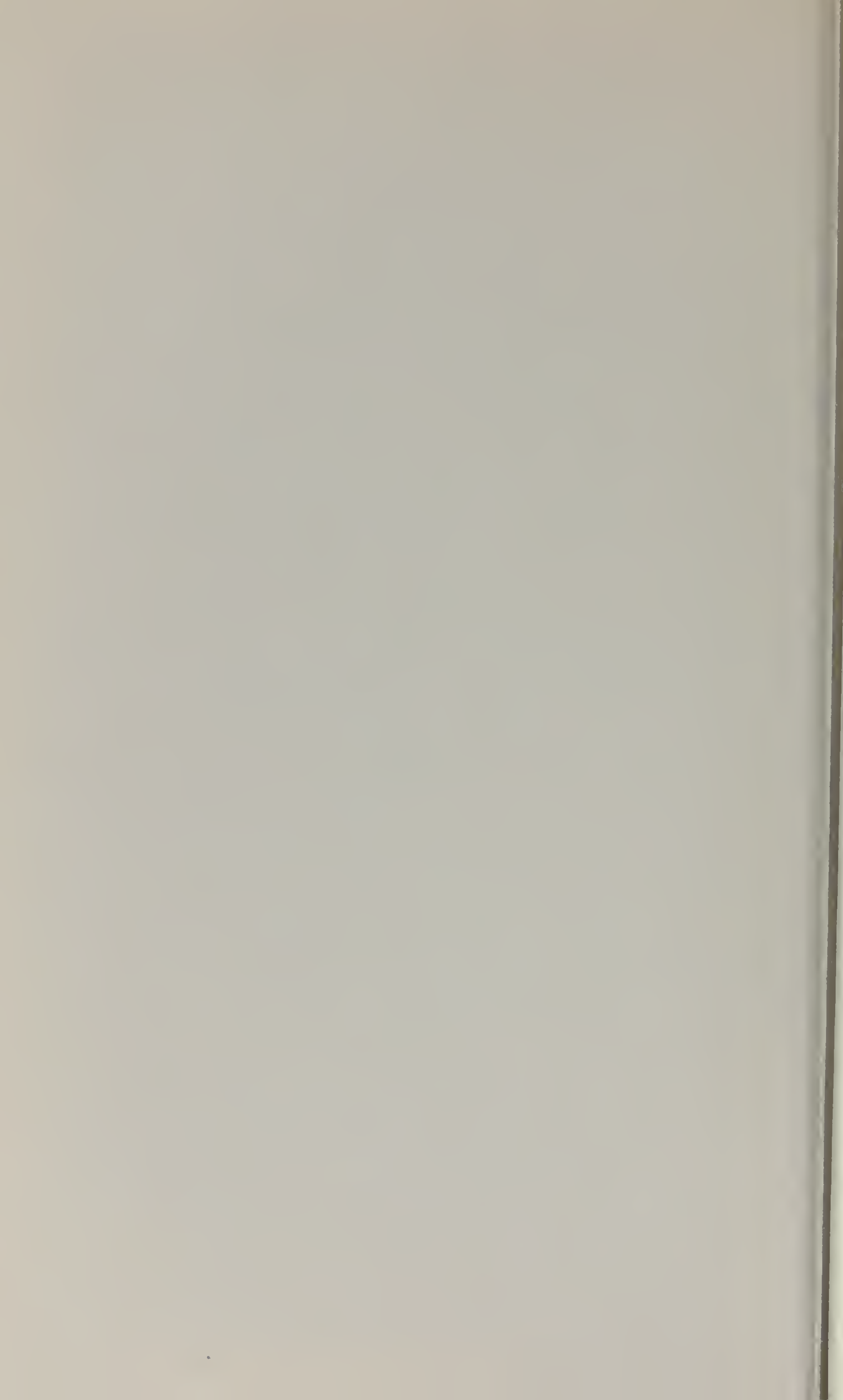

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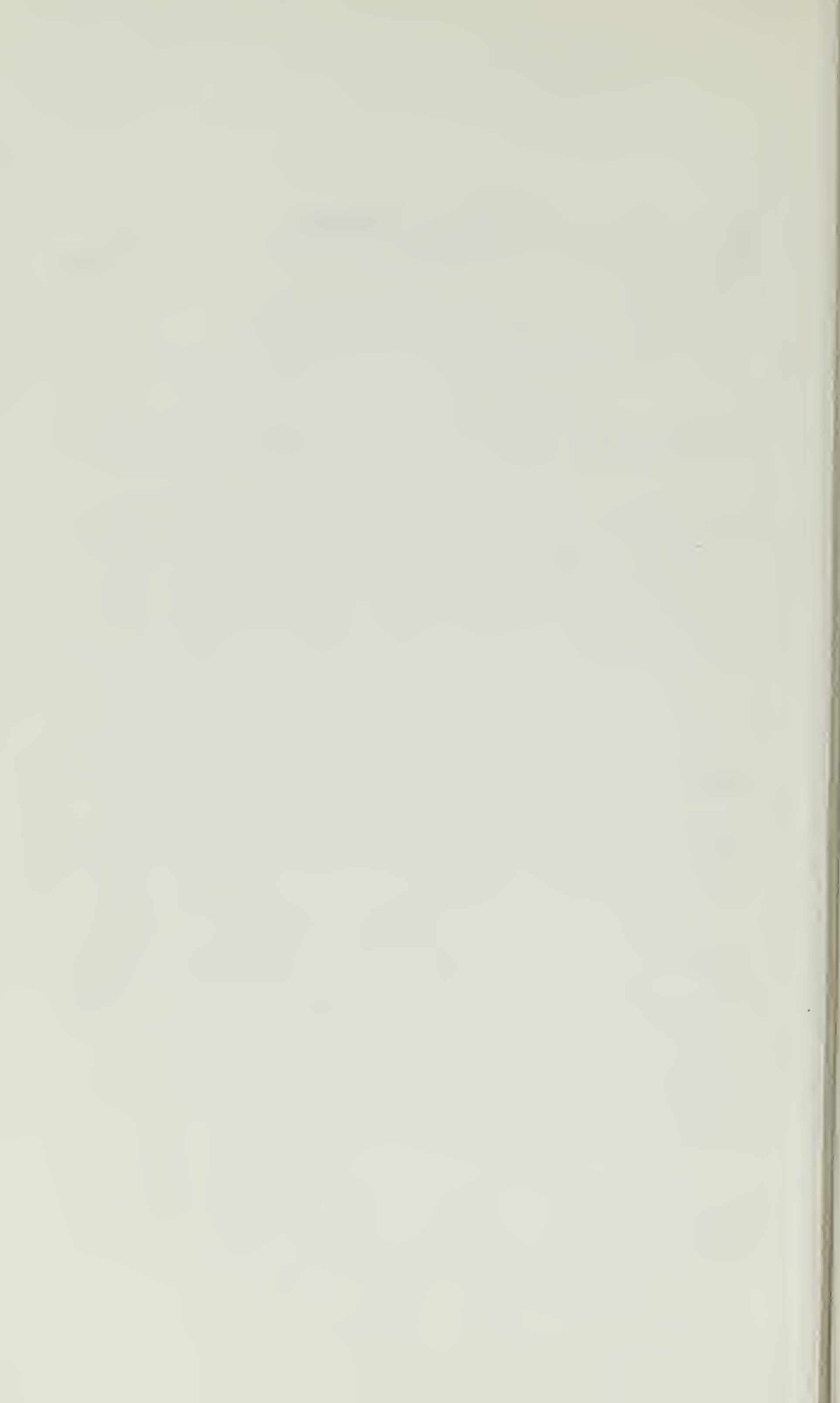

United States Court of Appeals

For the Ninth Circuit

SEVERO RUIZ CHAVEZ, Also Known as CAYETANO MENDEZ, *Appellant,* vs. JAMES McGRANERY, as Attorney General of the United States, and H. R. LANDON, as Director Direction of Immigration at Los Angeles, *Appellees.*	No. 13677

Appellant's Opening Brief

STATEMENT OF FACTS

Petitioner, a citizen of the Republic of Mexico, on September 27, 1947, was arrested under a warrant in deportation proceedings, charging that at the time of his entry on December 20, 1938, he was an immigrant not in possession of a valid immigration visa and not exempt from the presentation thereof by the act or regulations made thereunder. Hearings were conducted before the Service, and findings and conclusions were made and an order was entered which determined that the petitioner was (1) not ineligible

for naturalization; (2) that he was a person of good moral character, and (3) that he has resided in the United States continuously for the past 7 years and was residing in the United States on July 1, 1948, and that no evidence developed concerning his deportability under any of the grounds specified in section 19(d) of the Immigration Act of 1917. The Conclusions of Law determined that the petitioner met the statutory requirements for eligibility for suspension of deportation pursuant to section 19(c)(2)(b) of the Immigration Act of 1917, and that he meets the statutory requirement for eligibility for voluntary departure pursuant to section 19(c)(1) of the Immigration Act of 1917 as amended.

The hearing officer thereupon recommended that the petitioner be required to depart from the United States. The Immigration Board of Appeals affirmed the order requiring petitioner's departure. Thereafter a further petition was made to the Immigration Board of Appeals for a consideration of petitioner's right to suspension of deportation. The Board on October 19, 1951, ordered petitioner to depart from the United States with the proviso that deportation be effected if the alien did not avail himself of such required departure.

On July 2, 1952, the petitioner filed his action entitled "Petition for Judicial Review or Habeas Corpus", in which, in addition to alleging the foregoing he further recited that he had been a member of the

armed forces of the United States of America and received his honorable discharge from the Army of the United States on March 18, 1943 (R. 5); that he had been a resident of the United States continuously since the year 1938, and had registered under the Alien Registration Act of 1940. He further alleged that he applied for suspension of deportation on the grounds of seven years' continuous residence in the United States and residence on July 1, 1948, and of his continuous good moral character for a period of five years (R. 5-6).

The petition further recites the order of the Immigration Board of Appeals *that an order of deportation be not entered but that petitioner was required to depart from the United States,* and the further allegation that on the 19th day of October, 1951, the Board of Immigration Appeals entered an order requiring petitioner to depart from the United States.

Petitioner's complaint further recites that the hearings which resulted in the order requiring his departure were not held pursuant to the Administrative Procedure Act in full force and effect during the proceedings, in that pursuant to section 11 of said Act the hearing officer conducting the hearings was never duly, lawfully or regularly appointed pursuant to said Act, and therefore the hearings were conducted in violation of law (R. 5-9).

It further appears from the allegations of the petition that the Immigration Service in conducting said

hearings and in denying petitioner's request for suspension of deportation acted arbitrarily, capriciously and unwarranted and that the hearing officer in conducting the proceedings acted in violation of law (R. 9).

The allegations of the petition further recite that the actions of the Immigration Service were in violation of the rules and regulations of said Service and procedural due process of law (R. 9-11).

Judicial review was requested under section 10 of the Administrative Procedure Act (5 U. S. C. A. sec. 1009).

To the foregoing petition the respondent District Director appeared and moved for a dismissal on the grounds of "lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process and failure to join an indispensable party." (R. 14-15).

By memorandum decision of the District Court, respondent's petition to dismiss was granted and judgment of dismissal entered accordingly on the 31st day of October, 1952 (R. 21).

POINTS AND AUTHORITIES AND ARGUMENT

Petitioner seeks judicial review:

(1) of the processes and proceedings of the Immigration Service which resulted in an order for him to depart from the United States;

(2) of the denial of his application for suspension of deportation on the grounds that the actions of the Immigration Service were capricious, arbitrary, and unwarranted, and a denial of due process of law.

Petitioner contends that he is entitled to judicial review, as the Department did not direct his deportation from the United States and no outstanding order of deportation was entered against him.

This point comes squarely within the point raised in the case of *Jose Bustos-Ovalle v. H. R. Landon, District Director,* No. 13917, now before this Court for decision. This petitioner does stipulate that the ruling in the *Ovalle* case shall be binding upon him in the instant case on this point.

The memorandum decision of the District Court, after reciting the allegations of the petition and noting the grounds for dismissal by the respondent determined that:

> " . . . where the petitioner has alleged he was denied procedural due process of law which deprived him of the exercise of the Attorney Gen-

eral's discretion, he is entitled to a hearing and judicial determination of that question. This right is derived, not from the statute, but from the Fifth Amendment to the Constitution of the United States, which prohibits a deprivation of liberty or property without due process of law. *Bridges vs. Wixon,* (C. A. 9); 144 F. 2d 927.

"A decree requiring the Attorney General to exercise the discretion committed to him could only be effective if granted by a court with jurisdiction over his person. The Attorney General's residence is in the District of Columbia. This Court's process does not extend to the District of Columbia and it cannot require his attendance here. It, therefore, has no jurisdiction over his person. *Connor vs. Miller,* 178 F. 2d 755." (R. 18).

The Court then propounded the query, whether petitioner can proceed against the local District Director of Immigration, or whether the Attorney General is an indispensable party. The Court concluded that "The Attorney General alone is vested with the discretionary power to grant suspension of deportation, and a decree which expended itself on the District Director as the only respondent before the Court could not grant the relief the petitioner is seeking. It follows that the Attorney General is an indispensable party." (R. 18-20).

Petitioner contends that he is entitled to a judicial review to test the authority of the hearing officer to conduct the hearing; that the hearing officer's de-

nial of suspension of deportation and his order for petitioner's departure from the United States was erroneous, arbitrary, capricious and unwarranted, and subject to being review by judicial process. In order to subject a person to an order of deportation or departure, such orders presuppose a valid, lawful procedural due process hearing. We challenge the hearings as not having afforded the petitioner due process of law in the instant matter.

An order to depart or an order of deportation is not executed by the Attorney General of the United States, but by his subordinate officers. These subordinate officers are within the jurisdiction of the District Court and service of process was made upon the District Director at Los Angeles, who appeared in the action. While it is true that proceedings against the District Director would necessitate passing upon the validity of the order of the Board of Immigration Appeals directing voluntary departure from the United States, yet it is the District Director who must carry out the order. It is obvious that a subordinate officer is under command of his superior to do what the superior directs; yet such subordinate officer may be left under a command of his superior officer to do what the Court has forbidden him to do. This is immaterial. Appropos, if the Immigration Service had not afforded petitioner any hearing, but ordered his departure, which order was affirmed by the Immigration Board of Appeals, this process would obviously be an

unfair hearing and a denial of due process which the Court would have a right to review. The decree in review would expend itself upon the District Director, who exercises the power conferred upon him to effect petitioner's voluntary departure from the United States.

This matter comes squarely within the rule announced by the Supreme Court of the United States in *William vs. Fanning,* 332 U. S. 490, 92 L. Ed. 95.

The superior, in this instance, the Attorney General of the United States, is never an indispensable party to the action when the plaintiff attacks his authority to act or to issue the order or regulation complained of.

> *Colorado v. Toll,* 268 U. S. 228, 230; 69 L. Ed. 927, 45 S. Ct. 505;
> *Neher v. Harwood,* (9th Cir.) 128 F. 2d 846;
> *Varney v. Wareheime* (6th Cir.) 147 F. 2d 238, 242;
> *Greer v. Cline* (6th Cir.) 148 F. 2d 380.

On June 11, 1953, the U. S. Court of Appeals for the District of Columbia in *Rubenstein v. Brownell,* 206 F. 2d 449, determined that *Heikkila v. Barber,* 345 U. S. 229, had no application under the 1952 Immigration and Naturalization Act, but that orders of the Immigration Service were subject to review under the Administrative Procedure Act. On January 11, 1954, the Supreme Court of the United States granted certiorari

and affirmed the decision of the Court of Appeals. It has not been determined by any appellate court or Supreme Court of the United States that the Administrative Procedure Act does not apply to orders of the Immigration Department which grant voluntary departure and do not direct or enter an order of deportation. Petitioner contends that with respect to the order requiring him to depart from the United States without an order of deportation, even though such order was made prior to the 1952 Act, the Court has jurisdiction to hear and determine concerning the validity of the orders of the Immigration Service under the Administrative Procedure Act, section 10 (a, b, c, d and e).

The scope of the *Heikkila vs. Barber, supra,* opinion must be limited in its application to orders of deportation and has no effect upon or apply to orders of the Department that require departure from the United States without an order of deportation. The order of voluntary departure in this matter was determined by the officer within the jurisdiction of this court, whose superior, the District Director of Immigration, likewise was within the jurisdiction of this Court, upon whom process was effected.

WHEREFORE, petitioner respectfully requests that the judgment of the District Court be reversed.

Respectfully submitted,

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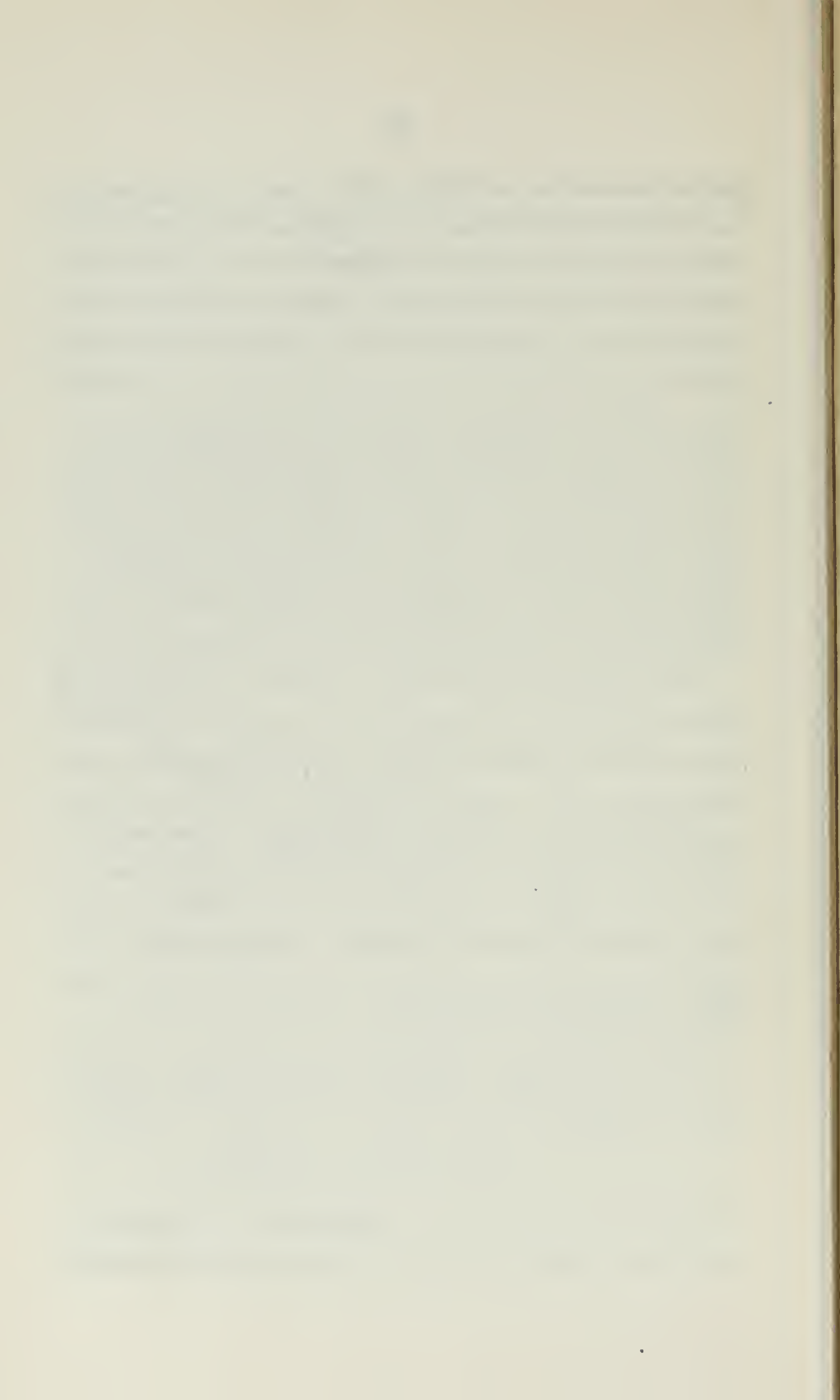

No. 13677

IN THE

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SEVERO RUIZ CHAVEZ, also known as CAYETANO MENDEZ,

Appellant,

vs.

JAMES MCGRANERY, as Attorney General of the United States, and H. R. LANDON, as District Director of Immigration at Los Angeles,

Appellees.

BRIEF FOR APPELLEES.

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FILED

MAR 11 1954

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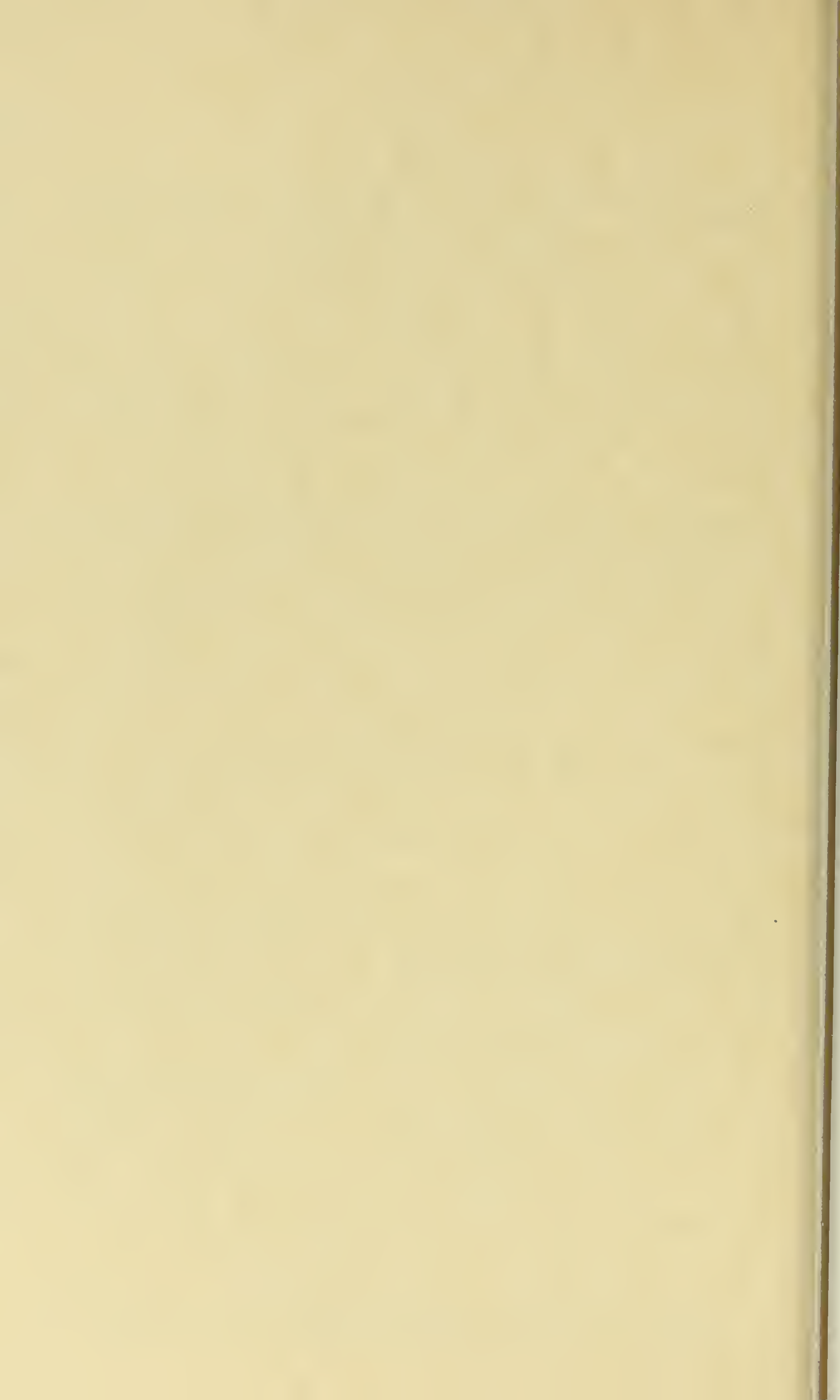

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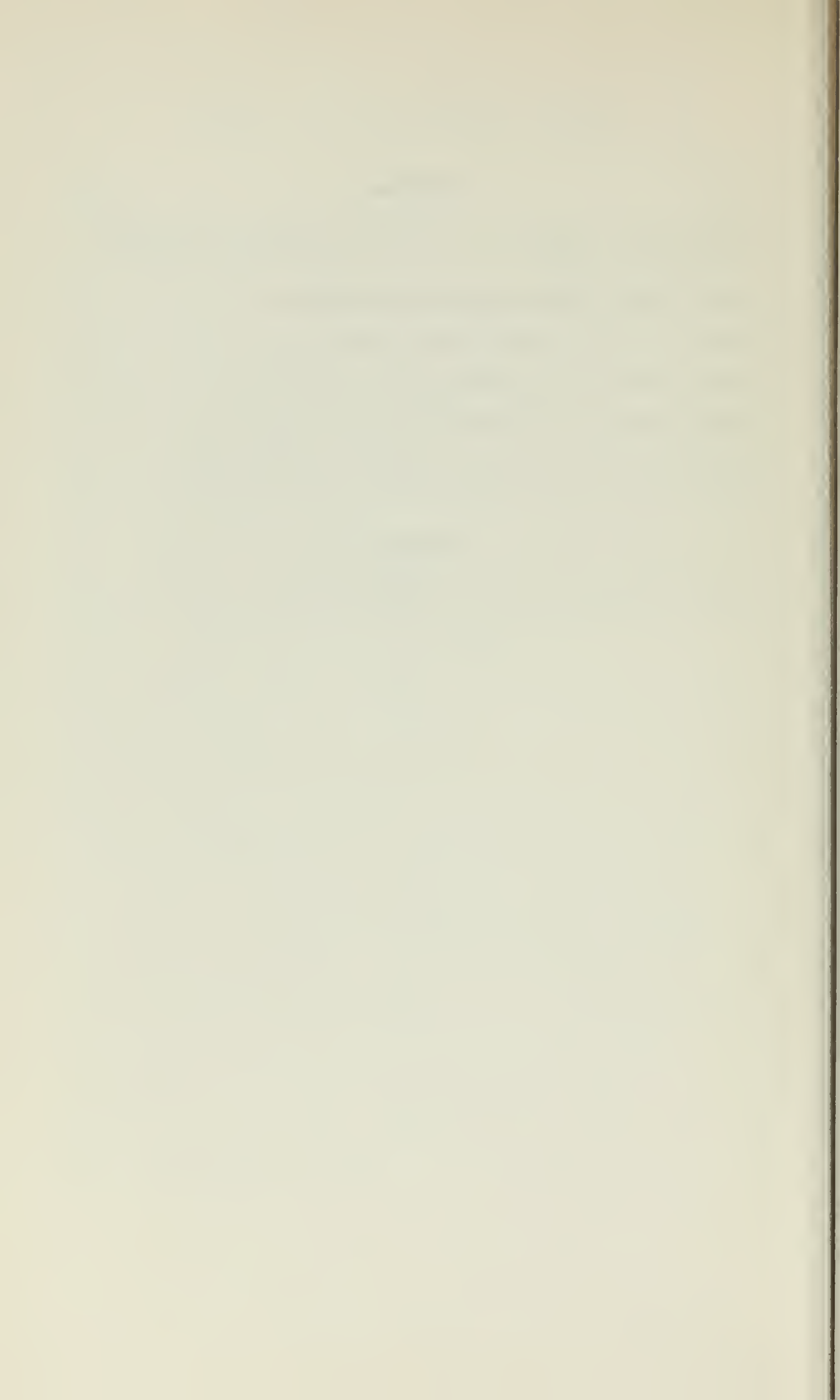

No. 13677

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SEVERO RUIZ CHAVEZ, also known as CAYETANO MENDEZ,

Appellant,

vs.

JAMES MCGRANERY, as Attorney General of the United States, and H. R. LANDON, as District Director of Immigration at Los Angeles,

Appellees.

BRIEF FOR APPELLEES.

I.

Jurisdiction of the Court.

On July 2, 1952, the appellant filed in the Court below, a "Petition for Judicial Review or Habeas Corpus." [Tr. 3-13.]

The appellant was not then nor has he been in custody. Appellant claimed jurisdiction there under Section 10 of the Administrative Procedure Act, Public Law 404, 79th Congress, Chapter 325. [Tr. 11.]

On October 31, 1952, the Court below docketed and entered a Judgment of Dismissal for lack of jurisdiction

of the person of the Attorney General and failure to join an indispensable party. During the pendency of this appeal, on March 16, 1953, the Supreme Court rendered its decision in *Heikkila v. Barber,* 345 U. S. 229, holding at pages 234, 235, that a deportation order may be attacked only in a habeas corpus proceeding. An Appellate Court, in disposing of a case, must consider any change of law or fact which has occurred since the judgment was entered.

Patterson v. Alabama, 294 U. S. 600, 607.

Where, as here, the subsequent decision of the Supreme Court shows that the District Court, and hence this Court has no jurisdiction of the subject matter, Federal Rules of Civil Procedure 12(h) applies. The pertinent portion of that rule is:

> "* * * Whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action. * * *"

It is submitted therefore, that the appellant's Complaint in the Court below, having been filed July 2, 1952, for judicial review, instead of habeas corpus (the petitioner not being in custody), and Judgment of Dismissal having been docketed and entered on October 31, 1952, this Court lacks jurisdiction of the subject matter and the appeal should be dismissed.

Zank v. Landon (9th Cir., June 19, 1953), 205 F. 2d 615.

II.

Statement of Facts.

Appellant is an alien, a native and citizen of Mexico who last entered the United States on or about November 18, 1938, near the port of El Paso, Texas. As admitted in the appellant's Complaint, at the time of his entry he was not in possession of an immigration document, visa, passport, or other travel document, which permitted him to enter and remain permanently in the United States. [Tr. 4, 16.]

At a hearing pursuant to a Warrant of Arrest issued in 1947 by the Immigration and Naturalization Service, having been advised of his right to do so, the petitioner made application for the privilege of suspension of deportation under the discretion granted to the Attorney General by Section 155(c), Title 8, U. S. C. A.; appellant's application was accepted and a hearing granted; it was determined that the appellant is a citizen of Mexico subject to deportation on the ground that at the time of entry he was an immigrant not in possession of a valid immigration visa; petitioner meets the statutory requirements for eligibility for voluntary departure pursuant to 8 U. S. C. A., 155(c)(1), and for suspension of deportation pursuant to 8 U. S. C. A., 155(c)(2); an order was made granting petitioner the privilege of voluntary departure under the authority vested in the Attorney General by Section 155(c)(1). [Tr. 8, 16.]

III.

Statement of the Case.

It is an undisputed fact that the appellant is a citizen of Mexico illegally present in this country and is deportable. As a deportable alien, he sought the exercise of the discretion vested in the Attorney General to grant the privilege of suspension of deportation. The Attorney General, in the exercise of his discretion, granted the privilege of voluntary departure, but did not grant suspension of deportation.

The appellant, dissatisfied with the result of the discretion exercised by the Attorney General, filed his Petition for Judicial Review naming the Attorney General and the local District Director of Immigration as respondents. His Petition alleged that the failure to grant him discretionary relief suspending his deportation was capricious, arbitrary and unwarranted and a violation of 8 U. S. C. A., 155. The review that the appellant sought was a review of the discretion of the Attorney General, or those acting for him, in denying to the appellant suspension of deportation.

The appellees moved for a dismissal on the ground of lack of jurisdiction of the person of the Attorney General, improper venue, insufficiency of process, insufficiency of service of process and failure to join an indispensable party.

The lower Court, after filing its Memorandum of Decision, which is reported in 108 F. Supp. 255, entered a Judgment of Dismissal on the ground of lack of jurisdiction of the person of the Attorney General and failure to join an indispensable party. This appeal followed. [Tr. 20, 21, 22.]

IV.

Argument.

That this Court lacks jurisdiction of the subject matter has been called to the Court's attention under "I. Jurisdiction," *supra*, and will not be further discussed in this brief.

The appellant named Attorney General McGranery, the then Attorney General, as a party respondent in the Court below. The Attorney General however was not personally served with process nor may he be served in this district, since his residence is in the District of Columbia.

Connor v. Miller (2d Cir., 1949), 178 F. 2d 755.

The Attorney General did not file an Answer nor waive the jurisdictional requirements.

With respect to the appellant's dissatisfaction with the result of the discretion exercised by the Attorney General, the Court, assuming it had jurisdiction over the person of the Attorney General, could not afford relief as Congress has committed the exercise of that discretion to the Attorney General alone, and the Court may not substitute its discretion.

Savala-Cisneros v. Landon (D. C. Cal.), 111 F. Supp. 129, 130;

Adel v. Shaughnessy (2d Cir., 1950), 183 F. 2d 371, 372;

United States ex rel. Kaloudis v. Shaughnessy (2d Cir., 1950), 180 F. 2d 489;

United States ex rel. Salvetti v. Reimer (2d Cir.), 103 F. 2d 777;

United States ex rel. Weddeke v. Watkins, 166 F. 2d 369;

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United States ex rel. Bartsch v. Watkins (2d Cir.), 175 F. 2d 245;

United States ex rel. Walther v. District Director of Immigration and Naturalization (2d Cir.). 175 F. 2d 693;

Sleddens v. Shaughnessy (2d Cir.), 177 F. 2d 363, 364.

If there has been a clear abuse of discretion, the Court can require the Attorney General to exercise his discretion properly. If there has been a failure to exercise discretion, the Court can only require that the discretion be exercised.

Adel v. Shaughnessy, supra.

Such an order can be made only by a Court exercising jurisdiction over the person of the Attorney General.

Savala-Cisneros v. Landon, supra.

The petitioner cannot proceed against the local District Director of Immigration alone. He has no discretion in the matter. The hearing officer, acting under the local District Director of Immigration, found that the petitioner was not ineligible for naturalization. [Tr. 7.] He *recommended* that the appellant be required to voluntarily depart from the United States. [Tr. 8.] It was the Board of Immigration Appeals that *ordered* that the petitioner be granted voluntary departure. The Board of Immigration Appeals was exercising the delegated power

of the Attorney General. Thus, applying the tests of *Williams v. Fanning* (1947), 332 U. S. 490, a decree which expended itself on the District Director as the only respondent before the Court could not grant the relief the petitioner is seeking. The relief which the appellant is seeking *requires affirmative action on the part of the District Director's superior.*

It follows that the Attorney General is an indispensable party.

Williams v. Fanning, supra;
Daggs v. Klein (9th Cir.), 169 F. 2d 174.

If then, as we contend, the Attorney General is an indispensable party, and under 28 U. S. C., 1391(b) could be sued only in the District of Columbia, it follows that the District Court for the Southern District of California lacked jurisdiction to grant the relief sought by the petitioner.

Blackmar v. Guerre, 342 U. S. 512.

Where an indispensable party is not before the Court, the only possible course for the Court to pursue is to dismiss.

Ernest v. Fleissner, 28 F. Supp. 326;
Barr v. Rhodes, 35 F. Supp. 223;
Moore's Federal Practice, Sec. 19.04, p. 2160.

V.

Conclusion.

It should be borne in mind, and the Court is respectfully requested to make special note of the fact, that the appellant does not dispute his deportability here. He admits that he entered the country illegally. He seeks only to review the discretionary denial of suspension of deportation. Thus, in this case, we have something "special" upon which to base our claim to a lack of an indispensable party. It is the fact that *only* the *Attorney General* can exercise the discretionary grant of suspension of deportation. He is the one who must be affected by the Court's order if relief is to be granted at all. However, there is growing strength in the law, that wherever a deportation order is reviewed apart from a habeas corpus proceedings, that the Attorney General or the Commissioner of Immigration is a necessary party to the action. Such has been the view expressed in such decisions as:

Connor v. Miller (2d Cir., 1949), 178 F. 2d 755;

Podovinnikoff v. Miller (3d Cir., 1950), 179 F. 2d 937;

Slavik v. Miller (3d Cir., 1950), 184 F. 2d 575; and

Paolo v. Garfinkel (3d Cir., 1952), 200 F. 2d 280.

And see:

Corona v. Landon (S. D. Cal.), 111 F. Supp. 191;

Medalha v. Shaughnessy (S. D. N. Y.), 102 F. Supp. 950;

Birns v. Commissioner of Immigration and Naturalization (N. D. Ohio), 103 F. Supp. 180.

How much stronger then is the instant case wherein the lacking party is the *only person* to whom Congress has granted the discretion to grant voluntary departure?

As stated by Judge Byrne in *Savala-Cisneros v. Landon, supra* (111 F. Supp. 129 at p. 131):

> "There is *only one person* who has the power to exercise the discretion of granting suspension of deportation to a deportable alien, and that is the Attorney General. He may exercise this power directly or by having a subordinate exercise it for him. If Cisneros complains about anyone other than the Attorney General refusing to grant suspension of deportation, he fails to state a claim upon which relief can be granted. If he complains that the Attorney General has refused to exercise his discretion, he can obtain relief only from a Court with power to order the Attorney General to exercise 'directly a power lodged in him or by having a subordinate exercise it for him.' *Williams v. Fanning, supra* (332 U. S. 490, 68 S. Ct. 189)."

Wherefore, for the reasons set forth above, if the Court determines that it has jurisdiction of the subject matter of this action, and it reaches the question of indispensable party, it is respectfully submitted that the judgment of the District Court in the instant case dismissing the action of the appellant should be affirmed.

Respectfully submitted,

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United States Attorney.

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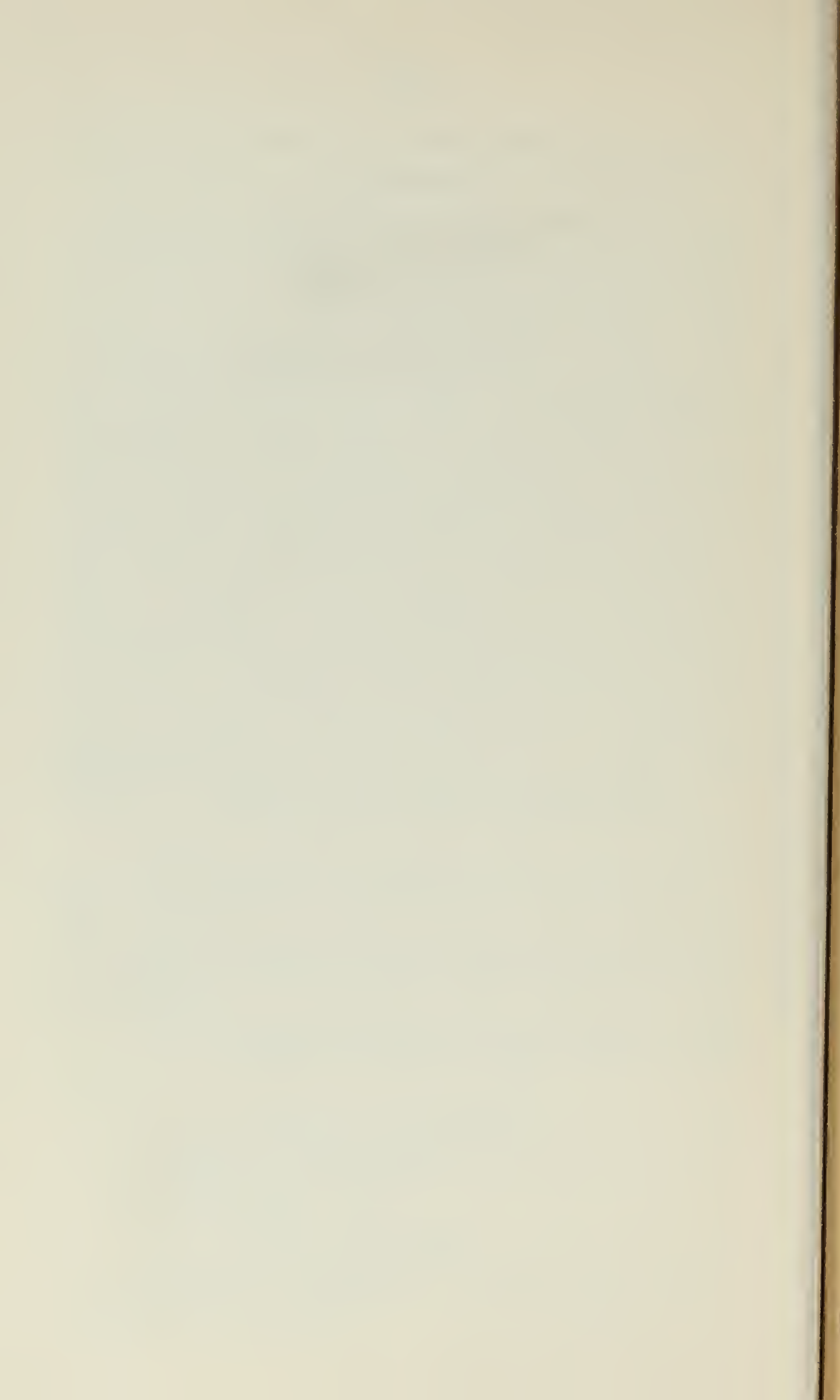

No. 13,681

United States Court of Appeals
For the Ninth Circuit

ERNESTINE C. SINISCAL and ELMER A. REED,
Appellants,

vs.

UNITED STATES OF AMERICA, as Trustee and Guardian and ex rel. of the Estates and Persons of Jasper Grant and Harold F. Thornton; HENRY B. TAYLOR and ELIZABETH A. TAYLOR, husband and wife; WILLIAM F. BRENNER and FRED M. MARSH,
Appellees.

UNITED STATES OF AMERICA, as Trustee and Guardian and ex rel. of the Estates and Persons of Jasper Grant and Harold F. Thornton,
Appellant,

vs.

ERNESTINE C. SINISCAL, ELMER A. REED, HENRY B. TAYLOR and ELIZABETH A. TAYLOR, husband and wife, and S. D. ALEXANDER,
Appellees.

Appeal from the United States District Court for the District of Oregon.

Honorable Gus J. Solomon, District Judge.

APPELLANTS' BRIEF.

FILED

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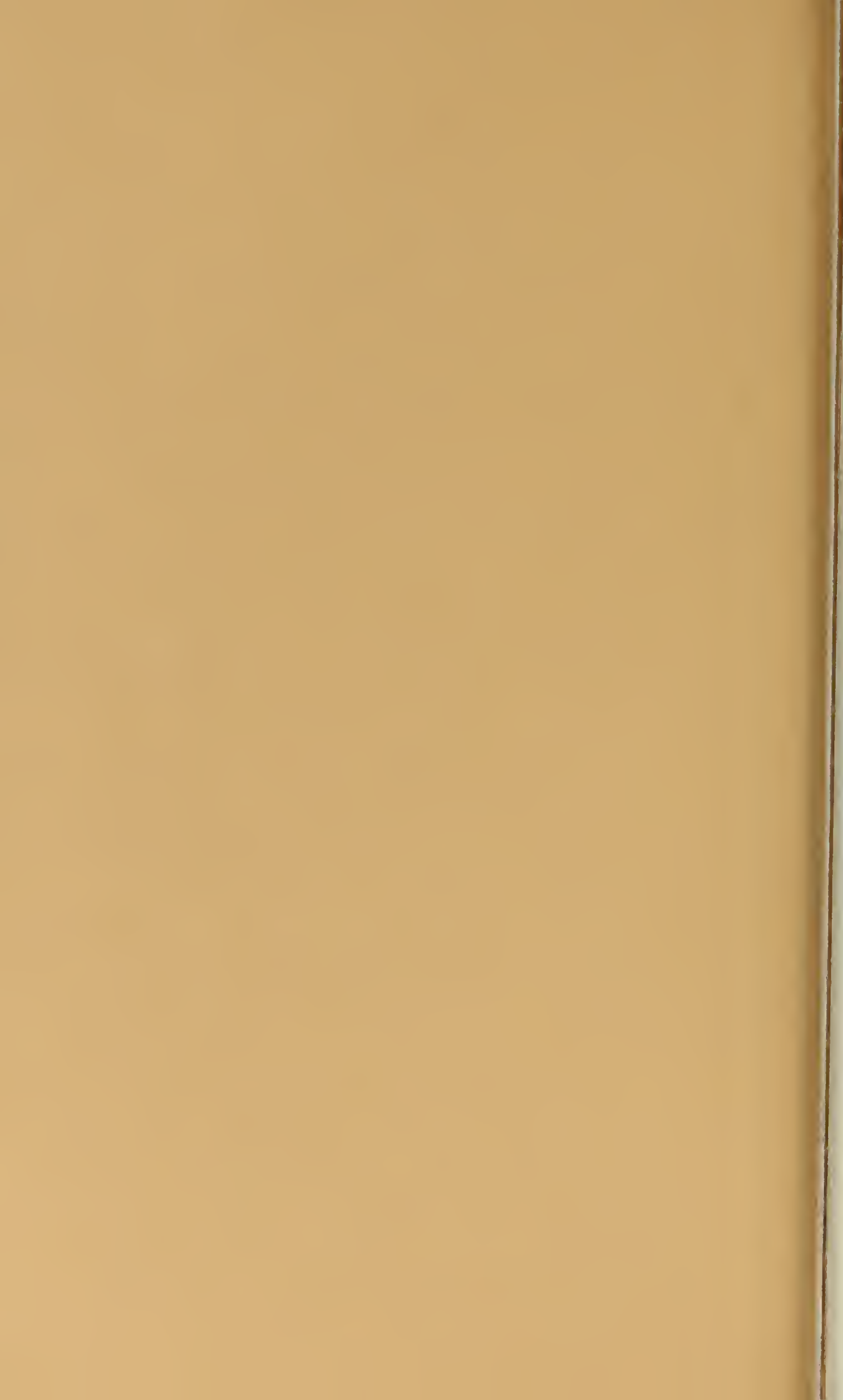

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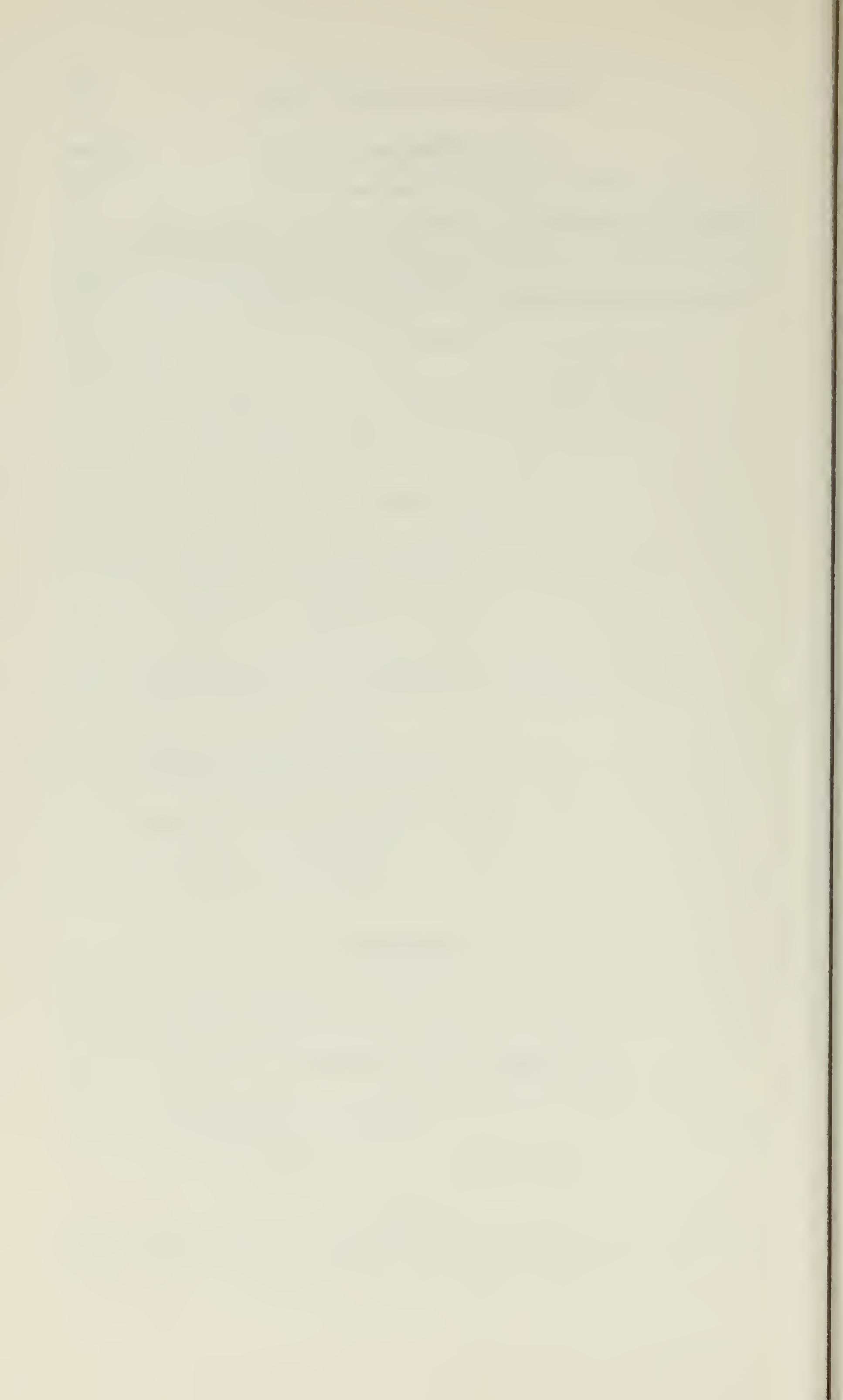

No. 13,681

United States Court of Appeals
For the Ninth Circuit

ERNESTINE C. SINISCAL and ELMER A. REED,
Appellants,

vs.

UNITED STATES OF AMERICA, as Trustee and Guardian and ex rel. of the Estates and Persons of Jasper Grant and Harold F. Thornton; HENRY B. TAYLOR and ELIZABETH A. TAYLOR, husband and wife; WILLIAM F. BRENNER and FRED M. MARSH,
Appellees.

UNITED STATES OF AMERICA, as Trustee and Guardian and ex rel. of the Estates and Persons of Jasper Grant and Harold F. Thornton,
Appellant,

vs.

ERNESTINE C. SINISCAL, ELMER A. REED, HENRY B. TAYLOR and ELIZABETH A. TAYLOR, husband and wife, and S. D. ALEXANDER,
Appellees.

Appeal from the United States District Court for the District of Oregon.

Honorable Gus J. Solomon, District Judge.

APPELLANTS' BRIEF.

STATEMENT OF THE CASE.

This is an appeal in a civil suit and is a conglomeration of almost everything in the book, and naturally the record is very voluminous, mixed and complicated,

which is the result of a dozen or more attorneys participating in the trial and representing a variety of defendants with a variety of issues. The Court made findings and conclusions and a decree that appellants Siniscal, Reed and Taylors had committed fraud in the sale of the land, and all documents executed for the sale of the land were held null and void, including the escrow agreement, and made directions as to the sale of the property by the Indian Bureau. The appellants Siniscal and Reed filed their appeal, then the United States of America as guardian and ward and trustee filed their cross-appeal, which does not concern these appellants Reed and Siniscal. The other defendants did not appeal. The appeal is from a decree against appellants and the Taylors.

STATEMENT OF FACTS.

The appellees claim that appellants and the Taylors conspired together to and did defraud these allottee Indians, Grant and Thornton, out of certain inherited interests of land and timber in Curry County, Oregon, apparently 750 acres of rough and stony land and unsuitable for agricultural purposes.

The appellants and the Taylors are the only ones found guilty of conspiracy to defraud by the Court, in finding and decreeing that the appellants and the Taylors were guilty of conspiracy and fraud in that the price of the land sold to the Taylors was of greater value than the appraisal of $135,000.

The appellees have cross-appealed against the Taylors, but appellants have no interest in that appeal.

These appellants made various efforts by motions to require appellees to make their complaint more definite and certain by setting forth more clearly the specific acts of conspiracy and fraud which these defendants were charged with in the complaint, but their efforts were denied.

The appellants unsuccessfully moved for dismissal of the complaint on the ground that no conspiracy or fraud had been charged or established. The Court also denied the motion to amend the amended findings.

In about the middle of May, 1951, a Mr. Alexander, mill operator who lives at Gold Beach, Oregon, near to this land in question, inquired of appellant Elmer A. Reed, a Siletz Indian living on the reservation, if he knew if this Indian land was for sale, and if it could be purchased, and Reed answered that he did not know, but they could inquire at the Indian Bureau, Portland, concerning it.

That thereafter appellant Reed and Alexander visited the Indian Bureau and were advised that it required the consent of the Indian owners and the appraisal of the land and timber.

That later Reed and Alexander were advised by the Indian Bureau that the timber and said land had been appraised at $135,000, and the consent of the Indians to sell was thereafter secured.

That Alexander wanted to buy the timber and land, and he entered into a contract with Reed whereby Reed was to purchase the land from the Indian sellers and sell it to Alexander for the appraised value of $135,000. That thereafter the Indian Bureau learned about this Alexander-Reed contract, and upon further investigation, found that Alexander was having difficulty raising the money, and the Bureau refused to proceed with the sale, and declared it closed, and Alexander and Reed were so advised. That Alexander thereafter started a public exposure through letters and newspaper articles to the effect that he was the one who was entitled to be the purchaser of said timber and land, in order to stop the sale to the Taylors. Alexander in this case was granted leave to intervene by order of this Court, and under the decree herein, the intervenor's case was dismissed.

In the latter part of July, 1951, a man by the name of Blanford, unknown to appellants, called upon appellant Reed, requesting him to purchase the land from the Indian owners and then sell it to a purchaser he might find, but Reed advised him that he had a contract with one Alexander, and the Indian Bureau had turned him down; however, he might see his daughter, Mrs. Siniscal, in Portland, Oregon, who was of the same Indian tribe, and she might purchase the property.

Thereafter in the latter part of July, 1951, said Blanford called upon appellant Siniscal and told her the appraised value of the timber and land was

$135,000, and if she would purchase it, and if he found a buyer, he would pay her $25,000 as a fee for her services. That about the 5th day of August, 1951, Blanford called appellant by phone and told her he had a buyer for this Indian land, and for her to appear at the Indian Bureau, Portland, on the morning of August 6, 1951, which she did, accompanied by her father, appellant Reed, as she was in a delicate condition, but she was told by Blanford that morning at the Indian Bureau that the parties buying this Indian land lived at The Dalles, Oregon, but they could not get there until tomorrow, and for her to return tomorrow morning to the Indian Bureau.

That in the forenoon of August 7, 1951, is the first time appellant Siniscal ever met the supposed prospective purchasers who were the Taylors, and Brenner, and Marsh. That Siniscal and her attorney and Mr. Taylor went to the Indian Bureau office, and there, at the request of La France, secretary of the Indian Bureau, Siniscal signed the final papers to complete the sale, the application for removal of restrictions on said land, and she was handed the order of removal of restrictions by the secretary, etc. The money was paid the Indian Bureau by Mr. Taylor by a bank draft for $135,000 in the presence of Siniscal and her attorney. Appellant Reed was not present.

After the completion of the sale appellants later in the day went to the office of Mr. Wilber Henderson, attorney for the Taylors, and thereupon an escrow agreement was executed between appellant Siniscal

and Mrs. Taylor for the $25,000 she was to receive from the Taylors as her fee for her services.

At the conclusion of the trial, the Court found that the appellants Siniscal and Reed and the Taylors had conspired to defraud and did thereby defraud appellees in that the timber was of the value of $300,000 instead of $135,000 as appraised by the Indian Bureau on May 16, 1951, and this is the principal basis from which this case arose. The Court finally absolved all the Indian Bureau officials of any and all fraud and liability in this land transaction, notwithstanding they were sitting in authority and directed what procedures were legal and proper. The appellant Siniscal had but little, if any, personal knowledge or information of her own and wholly depended and relied upon the information and directions received from the Bureau officials; in fact, she had no other choice. Furthermore, the officials of the Bureau prepared all documents in connection therewith and directed the appellant Siniscal to sign them which she did, and the sale was completed and the Bureau received the money. All of which did not require over ten minutes of time.

About the time this case was filed, Flinn, in charge of the Land Department, and La France were suspended from the Bureau. For what reasons, the appellants have no information or knowledge.

SPECIFICATIONS OF ERROR.

I.

The appellants Siniscal and Reed are enrolled Siletz Indians, and the relationship of guardian and ward exists with the United States of America. Can the United States of America be a plaintiff in a suit against the appellants while the relation of guardian and ward exists by both parties? Did the Government err by representing both parties as guardian and ward in this case at the same time?

II.

The Court erred in holding that appellant Siniscal merely was an agent and conduit by and through which Taylors acquired these lands and not an Indian pursuant to Section 241.11, Code of Federal Regulations, while the whole transaction was handled by the Indian Bureau as disclosed by the transcript of record.

III.

The Court erred in holding that the order signed by E. Morgan Pryse on August 7, 1951, transferring allottees' inherited trust lands to Siniscal was an ultra vires act, after the Bureau had supervised the whole transaction? Are the officials of the Bureau not estopped from denying their acts and conduct?

IV.

The Court erred in decreeing that the execution of the documents between appellant Siniscal and the

Taylors for the sale of said land, prior to the issuance of the fee patent, was null and void.

V.

The Court erred in decreeing that $135,000 paid for the land was grossly inadequate, after the United States of America had fixed the price of the timber land on May 16, 1951 and had offered it for sale to the public, for three months prior to this sale, at the appraised value of $135,000. If that was not the market value of the timber and land, how can the Court now claim that it all was the appellants' conspiracy to defraud which brought about this $135,000 appraisal?

VI.

The Court erred in decreeing the appellants were guilty of fraud and deceit in the sale of the land, after the United States of America had negotiated and made the sale from beginning to end, and appellant Siniscal only did what she was requested to do by the Indian Bureau which resulted in the Indian Bureau receiving the $135,000 for the appraised value of said land, which completed the transaction, as nothing further remained to be done, except the fee patent which was issued September 26, 1951.

VII.

The Court erred in finding and decreeing that appellant's conspiracy to defraud was the reasons for setting aside the sale, when as disclosed by the record,

the appraisal of the timber and land by the Indian Bureau at $135,000 was the real ground and basis of this whole case, and the appellant Siniscal was made the tool whereby this alleged conspiracy and fraud was perpetrated.

VIII.

The Court erred in setting aside the escrow agreement and the other documents therewith, and declaring them null and void, in view of the fact that the escrow agreement was made by the parties after the sale of the land had been fully completed. The consideration for the escrow was a separate deal and had nothing to do with the consideration for the land. It was a definite fee agreed upon between the parties for services rendered. The appellees had no interest therein whatsoever, and the Court had no jurisdiction over the parties or the subject matter. The title had vested in the Taylors when the fee patent had been issued by the Secretary of Interior, on September 26, 1951, and forwarded thereupon to the local Land Department of the Indian Bureau, and that terminated appellees' interest as allottees.

IX.

The Court erred in decreeing that the lands in question be resold by the Indian Bureau to the highest bidder, etc., which order was in direct violation of the United States statute prohibiting sales by the Court of allotted land owned by these appellants. (Al-

lotment Act, February 8, 1887 (24 Statutes 389, as amended February 28, 1891).)

X.

The Court erred in finding appellants had committed fraud when appellants had no knowledge or information as to what representations or transactions all the other defendants had with the Indian Bureau, it was the Indian Bureau's duty to advise Siniscal correctly as to the procedure required for the sale. Appellants had no knowledge nor participated in anywise in the preparation or negotiation of the sale except her financial statement and only signed the documents the Indian Bureau requested of Siniscal.

XI.

The Court erred in charging Siniscal and Reed with fraud in her application for removal of restrictions after they had performed all the requirements requested by the Indian Bureau. The financial statement in the application to remove restrictions, which was only an administrative local form, was made and used only for the sole purpose to advise the Bureau of her ability to handle the property after she agreed to purchase it. The Indian Bureau was not interested as to where Siniscal would get the $135,000 to pay the price of the land. What difference does it make where or how Siniscal got the money, as long as the Bureau got the $135,000 it demanded as the price for the timber and land.

XII.

The Court erred in not decreeing that in as much as the land had been sold by the Indian Bureau, with the consent of the appellees, and the $135,000 had been paid to them, that they were fully satisfied. The appellees has spent a considerable portion of it and had a guardianship appointed over them in the State Court. Some of the timber had been cut down on the land, and expenses incurred thereon. The Indian appellees were paid monthly allowances even after this case had been filed. The Indian Bureau had deducted 10% for its services, and other steps were taken to dispose of the matter. The patent was issued to Siniscal on September 26, 1951 for this land by the Secretary of the Interior. That in good conscience and equity the suit should have been dismissed by the Court, and these allottees be permitted to enjoy the benefits therefrom in their old days. They wanted a home to live in during their old days, as they never had one.

THE ISSUES.

I.

Was it not error for the Court to make findings and conclusions and decree that the appellants had committed fraud in preparing and executing the applictaion to remove restrictions and especially so after the undisputed evidence disclosed that appellant Siniscal could have secured a loan for $135,000

from any bank on the coast? Furthermore, the appellant had been advised that the prospective purchaser of the land would pay the price in full of $135,000 to Sinsical, which saved Siniscal a lot of extra expense and time, and no one was injured. The Bureau Officials accepted the money and thereafter gave a personal receipt therefor to Siniscal accordingly. The Indian Bureau officials were not interested or concerned how or from whom or where Sinsical got the $135,000 to pay them the price of the land. All it wanted was that amount of money, $135,000, and no one was harmed.

II.

Was it not error for the Court to make findings and conclusions that the appellant Sinsical had committed fraud in signing the application to remove restrictions, when the evidence disclosed that in fact, it was the method and procedure that appellant Siniscal was advised to follow, and she depended wholly upon the Indian Bureau officials as to the method and procedure required? If anything was wrong in the procedure in the handling of this transaction, it was the officials' absolute duty to so advise Siniscal and the Taylors, right then and there. Furthermore, this method and procedure had been followed all these years by the Indian Bureau without complaint.

III.

Did the Court err in making findings and conclusions that appellants and the Taylors had committed

conspiracy to defraud, when no one was injured or damaged as a result of the sale of the land, and when the Indian Bureau had fixed the price of the timber and land at $135,000, and on the 7th of August, 1951 appellants paid that amount to the Bureau for the use and benefit of said appellees, and it was so accepted? Why is appellant Reed made a party defendant and now an appellant when he had nothing to do with this sale or transaction? The fact is that his daughter was in a delicate condition and required an attendant, and the father was the proper person.

IV.

Was the Court in error when it made findings and conclusions that the appellant Siniscal had committed fraud in the sale of said land to the Taylors, as a mere agent for hire, instead of purchasing the land for herself, and she was therefore not an Indian for her own account? The Indian Bureau had full information and knowledge, and no one of the officials in any way questioned the procedure followed. Everything was all right until Alexander blasted his horn, shouting fraud, when he did not get the timber, and he is the one who started the fireworks, but he himself was to blame for his loss.

V.

Did the Court err in making findings and conclusions exonerating Area Director Morgan Pryse and other officials of the area of the fact that they were unaware of the true value of the property involved

herein, and the procedure and method followed, etc. in the sale? The Area Director testified that the Bureau had been following the wrong procedure in this as well as in former and later sales of Indian land, and that the Court should give them the correct opinion on it, as to how to handle these sales (Vol. I, p. 345, Tr. of Rec.), when it was the duty of said officials to strictly observe and comply with all laws, rules and regulations thereunder, which were unknown to appellants and the Taylors, and furthermore the Bureau had special counsel right at the Indian Bureau, with whom they could consult.

VI.

Was the Court in error in making findings and conclusions of law that the escrow agreement between Taylor and appellant Siniscal, for the payment of her services in the sale of this land be set aside and is null and void, notwithstanding, the escrow was a separate and distinct agreement between separate and distinct parties and for a new and different consideration, and constituted no part of the sale of the land, and was made 3 or 4 hours after the sale had been fully completed at the Indian Bureau. The patent to the land had been issued September 26, 1951, to Sinsical. The government had the sole power to extinguish titles to Indian allotted lands.

VII.

Was the Court in error in decreeing that this Indian land be resold by the Indian Bureau to the

highest bidder, in view of the law prohibiting sales by any Court of allotted lands?

ARGUMENT.

I.

CAN THE GOVERNMENT MAINTAIN THIS SUIT WHEN THE RELATIONSHIP OF GUARDIAN AND WARD EXISTS BY BOTH PARTIES?

The relation of guardian and ward is so mixed up among the numerous Indian tribes by statutes, regulations and Court decisions, that it is next to impossible to segregate them from among the numerous other tribes. If one finds the words guardian and ward, incompetent etc. in the Indian law, it is impossible to apply it to any particular tribe or situation, as many tribes have special laws, evidently enacted to fit the situation. It is the universal law that a person who has a guardian, is either a minor or is incompetent in some form, that prevents him being competent mentally, a minor, or otherwise. There can be no question that the appellants are incompetents, and likewise the relation of guardian and ward exists between appellees and the government in so far as the land is concerned. How did the Court acquire jurisdiction over the appellants in this case?

II.

WAS SINISCAL AN INDIAN OR A CONDUIT FOR THE TAYLORS IN THIS SALE?

Did the Court err in finding that appellant Siniscal was not an Indian when she signed the documents whereby she acquired the title to the land and thereafter conveyed it to the Taylors? The government and not the Court has the right to declare when Siniscal's guardianship ends. The Indian Bureau officials prepared the documents and had Siniscal sign them as an Indian. After she acquired the title to this land and conveyed to the Taylors, she still was an Indian. I do not know under what law or authority the Court acted in declaring Siniscal a non-Indian when she is an enrolled Indian upon the records of the Siletz Indian Reservation, and the Court had no right or authority to suspend her temporarily as a non-Indian. There can be no question but that Siniscal was an Indian under Sec. 241.11, Code of Federal Regulations when she signed all those documents at the request of the Indian Bureau officials. Granting the Courts finding that she was a non-Indian on the ground that she had committed fraud, which we deny, it still did not give the Court authority to find her to be a non-Indian under these circumstances.

III.

WAS THE ORDER SIGNED BY PRYSE TRANSFERRING INHERITED INTEREST LAND TO TAYLORS AN ULTRA VIRES ACT?

An ultra vires act is generally defined as an act performed beyond the powers authorized. We presume that the Court meant that Siniscal acted beyond the scope of her authority. She still was an Indian under guardianship when she made the conveyance to the Taylors. The Indian Bureau advised her when she acquired the title to the land, she could sell to anyone she pleased, and that was the law and the procedure they pursued at the Indian Bureau. If the Indian Bureau was wrong in giving Siniscal this advice, why should her acts be held to be ultra vires? No one can claim that there was any willful violation on her part. In any event, we do not consider her act in that respect as an ultra vires act. There certainly was no fraud connected with it.

IV.

WAS THE SALE BETWEEN SINISCAL AND TAYLORS NULL AND VOID ON THE GROUND THAT IT WAS PRIOR TO THE FEE PATENT?

The Court was in error when it declared and held the contract between Siniscal and Taylor void. Siniscal never had met the Taylors before they arrived at the Indian Bureau office on August 7, 1951. How could Siniscal apply for a fee patent before she had an order removing restrictions. For answer to this situation we say that the title vested when the Indian

Bureau transferred to her on August 7, 1951, the inherited interest of the appellees, and then she had a right to sell the land. All this was testified to by both Pryse and La France repeatedly in their testimony, which extends throughout their whole testimony, and Pryse referred to the Act of August 8, 1946 (60 Fed. Stat. 939). Exhibit 4 is the order removing restrictions and Exhibit 5 is the transfer of inherited interests. It would necessitate a greater portion of the testimony of Pryse and La France to correctly advise the Court, but it is too long, and we ask the Court to read the whole of it.

Inasmuch as some of the specifications of error are so interlocked in the testimony it becomes necessary to join them together to avoid repetitions.

V and VI.

THE APPRAISAL.

WAS IT ERROR FOR THE COURT TO REEVALUATE THE TIMBER?

The first act in this case was the appraisal of the timber and land by Mr. Gray, (and his testimony beginning on page 516 to 532 transcript of record; Exhibit 13 is the appraisal) who was an employee of the Forestry Division of Bureau of Indian Affairs at Swan Island area, and had been such employee for 34 years. Appraisals were a part of his duties. This appraisal is entitled to high credit as an act of an official of the Indian area. His testimony is frank and

open and recites his appraisal in detail. The cruise showed approximately somewhere over 19 million feet, and he raised this amount from the former cruise of 1925 to approximately 24 million feet which is pretty close to the figures of 26 million feet found by the special government appraiser on 800 acres. There always is a presumption that an official duty has been honestly and regularly performed. This appraisal is the real crux in this case, from the very beginning to the last drop. The appraisal was made on May 16, 1951 at the request of Mr. La France as secretary of Indian affairs after Alexander inquired what the appraisal of the timber and land was.

This appraisal was made the outstanding issue throughout the trial. The allottees Grant and Thornton were satisfied with the appraisement of Gray, and they wanted their money; so they could secure a home to live in after they had been trying for 30 years to sell it. (Volume III near the top of page 556, transcript of record.)

There was a conflict between the witnesses as to the value of the timber and the market price.

Inadequacy of consideration is not significant in suits over Indian lands.

> 27 *Am. Jur.* 562-565, Secs. 34-35;
>
> *Klamath and M. Tribes v. U. S.,* 80 L.Ed. 202, 296 U.S. 244;
>
> *Thory Wire Hedge Co. v. Washburn Co.,* 40 L.Ed. 205, 159 U.S. 423-443;
>
> *Wheeler v. Smith,* 13 L.Ed. 44-45.

The presumption is at all times in favor of the appellants, that there was no conspiracy to defraud these men in the sale of their land, and the government has the burden of proof to overcome this presumption. The Indian Bureau had full and complete charge of the appraisal when it was made on May 16, 1951. Neither of the appellants were at that time interested in the purchase of this land or knew anything about it. The appellants have never seen the land and timber at any time. All information Reed had was later obtained through the Indian Bureau and Alexander. The appellant Reed certainly cannot be held guilty of conspiracy of fraud in the sale of this land, after Alexander was turned down in the middle of July 1951 from becoming a purchaser of the land, and then Reed had no further interest in the matter. Thereafter Blanford, a stranger to Reed, called upon Reed to become a buyer for the land and then sell it to a purchaser Blanford might find, which Reed refused to do on account he had been turned down on the Alexander matter, but suggested he could see his daughter, appellant Siniscal, who was of the same tribe as these Indians, Grant and Thornton. Blanford also was a stranger to Siniscal, and when he offered her $25,000 for her services, in case he would find a buyer, she consented to act (p. 787 Vol. III, Tr. of Rec.), and he told her it had been all arranged at the Swan Island office so he could get the land for his buyer. The rule is in absence of fraud or bad faith, the appraisal is conclusive.

Polley's Lumber Co. v. U. S., 115 Fed. (2d) 751 (9th Cir.);

U. S. v. Harris, 100 Fed. (2d) 268 (9th Cir.); *U. S. v. Gleason,* 175 U.S. 588.

Application for removal of restrictions.

Counsel for appellees made considerable out of what they claim to be "Falsehoods in this application". No specific falsehood is pointed out. It may be that her values are somewhat over-stated. However, if the application was for the purpose of determining whether or not the applicant had sufficient money to buy the property in question, it is obvious that she did not, and no one was deceived in that respect. She shows a total income of $20,000.00, gross, and then she states she owns a one-half interest in a seafood and grocery market.

Under the third subsection, which is a statement of assets and investments, she shows a one-half interest in the business of $4,000, an automobile, machinery and household goods, aggregating $9,500.00 and town property valued at $17,000.00. It is patent that she did not have the $135,000.00 necessary to pay for the property. There is no statement made in the application, material to the determination, as to whether or not Ernestine C. Siniscal was eligible to buy the property in question, that is not true; furthermore, it was only a local administrative form for the use of the Bureau. If she had gone to a bank to secure a loan and presented a financial statement, which was false, then she would become liable; however, this is a wholly different situation, in this respect, that this application for removal of restrictions required a

financial statement, which was for the sole and only purpose of informing the Indian Bureau as to whether or not Siniscal was capable of handling the property after she took it over. The testimony of La France and Pryse is too lengthy to be quoted on these points.

As we said before, if the purpose of the application was to determine whether or not she had the $135,000 with which to purchase the property, she made no falsehood in that respect. The purpose, however, of the application was to show only her business competency to handle the property after she got the title. No material misstatement was made in that regard. This fact was clearly evidenced by La France and Pryse repeatedly in their testimony, that they were not interested where or how Siniscal obtained the $135,000. It was self-evident that if she did not have the money, there could be no sale. What difference does it make as long as the government received the $135,000 for the timber and land, which was the government's appraisal value. There certainly could be no claim of fraud by appellees.

The provision for the sale of allotments of incompetent Indians under such rules and regulations, as the Secretary of the Interior may prescribe, are set forth in the Act of March 1, 1907 (34 Stat. 1018; 25 U.S.C.A. 405), and evidently under this law, this sale was consummated. The government held the fee patent on this land and proper application was made by Siniscal for a fee patent, and on September 26, 1951 the

Secretary of the Interior granted her a fee patent to this land. The Indian Bureau evidently had been advising prospective purchasers that no fee patent was required. In fact, as disclosed by the testimony of Reed he purchased a tract of Indian allotment land in October 1951 and was advised that no fee patent was required after the removal of restrictions, and he sold the land immediately to a Mr. Miller who proceeded to log it off. (Vol. III, Tr. of Rec. p. 968.)

VII and VIII.

TRANSFERRING INHERITED INTERESTS.

Was it error by the Court to cancel all documents including restrictions and escrow?

The order transferring inherited interests should, inter alia, read as follows:

> "is hereby transferred to the United States in trust for the...for use and disposition as other tribal land within said Indian Reservation." Ex. 22.

It is manifest that this was not the correct form, for the reason that the land in question was not within an Indian Reservation. Why should they use a form that would recite that the land was "for the use and disposition as other tribal land within said Indian Reservation", when, as a matter of fact, the land was not within an Indian Reservation, and it was in no sense tribal land. Mr. La France said that the form contain-

ing the above excerpt, which is in evidence as Exhibit 22, was not applicable because that particular form was for use for lands that fell within the Reorganization Act. The form that was actually used (Exh. 5) contains the following:

> "NOW THEREFORE, by virtue of the authority conferred upon the Area Director by the statutes hereinabove referred to, and other applicable provisions of law and by Departmental and Indian Office orders, I hereby declare that all right, title, interest, claim or demand of any nature whatsoever of the heirs of the above-named Eliza Grant, Chancy Grant, Clara Grant, Captain Jack, and Sandy Grant, all deceased, Public Domain allottees No. R-80, 82, 83, 84 and 103 respectively, in and to the
>
> (Property Described)
>
> is hereby transferred to Ernestine C. Siniscal, an enrolled member of the Confederate Tribes of Siletz Indians, subject to the express condition that these lands shall not be alienated, sold, or encumbered without the consent of the Secretary of the Interior."

This shows that the only thing transferred was the right, title, interest, claim and demand of the original allottees in the land in question, and that the transfer was "subject to the express condition that these lands shall not be alienated, sold, or encumbered without the consent of the Secretary of the Interior". This restriction, for such it amounts to, retained in the Government all of the substance of the restriction of the original trust patents. Ernestine C. Siniscal could not

make any disposition of the land, that is, by way of alienating, selling or encumbering, without the consent of the Secretary of the Interior. Appellees look to form rather than substance, and there has never come under our observation a more pronounced deference to form over substance than in this instance.

It is the height of absurdity to attempt to impeach this transaction on the basis of a particular form not having been used. As we said before, the key to the whole situation was with the Secretary of the Interior. With the Secretary of the Interior rested the rights of Ernestine C. Siniscal to alienate, sell or encumber the land.

The testimony of E. Morgan Pryse on pages 344 to 351 inc. Vol. I. Tr. of Rec. clearly shows the manner the Indian Bureau operated under in removal of restrictions in this land sale as well as others. When Siniscal executed the document removing restrictions on this land, she believed and did what she was told by the Area Officials that she could sell the land to anyone she chose, as the title was vested in her, and Siniscal was so advised by the Area officials, and she believed and relied upon it as being true and correct.

The fee patent.

The Secretary of the Interior issued a fee patent to Siniscal for this land on September 26, 1951.

The Circuit Court, E. D. Washington, S. Division held in

Le Clair v. U. S., 184 Fed. 128,

> "That the presumption of a fee patent can only be set aside upon the most clear and convincing proof, is the established doctrine of the Supreme Court."

The deed conveying this land from Siniscal to the Taylors was executed August 10, 1951. An application for a fee patent was filed by Siniscal with the Secretary of the Interior, and he issued a fee patent to Siniscal on September 26, 1951 and delivered it to the Land Office Department of the Indian Bureau, Portland, and there it was held up on account of the claim made by Alexander that he should have been permitted to purchase the land instead of the Taylors.

In

> *Davis v. Robedeaux et al.,* 222 Pacific 990 (Oklahoma, Jan. 22, 1924),

the Court says:

> (1) "It was a question in the trial of the case as to whether or not title passed to the land after issuance of patent and before delivery of same to allottee, and the defendant contended that title passed to the allottee upon issuance of the patent, and the restrictions on alienation being removed, the allottee could sell and convey title to the same before the patent was delivered to him and urges this proposition in his brief, citing:
>
> United States v. Schurz, 102 U. S. 378, 26 L. Ed. 167
>
> Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60
>
> Monson v. Simonson, 231 U. S. 341, 34 Sup. Ct. 71, 58 L. Ed. 260; and Act of 1887 (U. S. Comp. St. §4195 et seq.)

> authorizing allotments of land in cases such as the one under consideration. The plaintiffs, in their brief conceded the point, and we give it our approval without discussion".

In accordance with the authorities above cited, the Siniscal fee patent executed on September 26, 1951 made the deed from Siniscal to the Taylors effective on August 10, 1951.

The escrow.

The Taylors were the depositors of the $25,000 check in escrow with the U. S. National Bank, Portland. However, through their attorneys they were to exercise full control over the money as to its delivery, by reason of which the depositor bank never came into full control of the escrow, and said escrow is void.

10 *R.C.L.* page 626, Par. 8 and Decisions;
Van Valkenburg v. Allen, 126 N. W. 1092;
Prutsman v. Baker, 11 Am. Rep. 592;
Campbell v. Thomas, 24 Am. Rep. 427;
19 *Am. Jur.* 425, Sec. 9 and Citations.

The Court had no jurisdiction over the parties or the subject matter of this escrow, for the reason that it was a separate and distinct agreement and not connected with this suit, and there is a new consideration for the escrow.

After the sale had been completed at the Indian Bureau in the forenoon of August 7, 1951, the parties returned to Portland. Later in the afternoon, Siniscal and her attorney went to the office of Mr. Henderson

where the escrow agreement Ex. 2 (a) was executed by the parties.

It will be observed that the escrow, Ex. 2 (b) p. 433 of Tr. of Record, provides that the check for $25,000 is payable to Siniscal, and that the bank is authorized to deliver the money upon receipt from the firm of Platt, Henderson, Cram and Dickinson, attorneys, advice that they have rendered an opinion that a merchantable title is vested in Mr. and Mrs. Taylor of the said real estate. That the escrow is to terminate at 5 o'clock P. M. August 14, 1951, unless the bank receives a letter from said Platt, Henderson, Cram and Dickinson, attorneys, that there is an objection to the title of said real estate, which is to be corrected.

There was in law no escrow for the reason that the depository never had full control over it, as the Taylors had their attorneys, who also were their agents, keep control of the money for them, which made the escrow void.

The deed of conveyance to this real estate had been theretofore delivered to the grantees, the Taylors, and this escrow was to pay Siniscal for her services in the transaction by which the Taylors secured the title to this property.

At the time this escrow was executed, there was the practice and belief by the Indian Bureau, that title to the land vested in grantees upon the "Removal of Restrictions", and that procedure had been followed for a long time prior to and subsequent to the date of this escrow by the Indian Bureau.

See testimony of Pryse and La France.

However, the Taylors, as soon as they received said deed on August 10, 1951, from Siniscal, had her promptly make through their attorneys an application to the Secretary of the Interior, for a fee patent to this land, and Siniscal did secure her fee patent on said land on September 26, 1951. Thereafter in March 1952 when this suit was filed, the Taylors were cutting timber on said land, but they refused to allow the U. S. National Bank, as the escrow depository, to pay said check of $25,000 to Siniscal, and it still lies there in the bank. Siniscal has in all respects fulfilled her obligations to the Taylors.

The escrow does not contain a sufficient statement of the relationship of the parties thereto nor as to the object and purpose of the escrow.

IX.

DID THE COURT ERR BY ORDERING THAT THE TIMBER AND LAND BE RESOLD BY THE INDIAN BUREAU?

Court order to sell land.

The Court decreed on page 66, Volume I, paragraph 8, that the land and timber involved in this suit be sold by the Bureau of Indian Affairs to the highest bidder, etc. We claim that the Court had no jurisdiction to order the timber and land to be sold. The allotment Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. 372, and amended in 1891, provides that allotted Indian land shall not be sold by decree of any Court. The only thing the Court could do was to

return the land to the appellees, the original owners, and it is up to them to say if they desire to sell it.

X and XI.

DID THE COURT ERR IN HOLDING THAT APPELLEES WERE GUILTY OF FRAUD AND DECEIT IN THE SALE OF THE LAND?

Were the appellants guilty of conspiracy and fraud in any particular in this whole transaction, taking into consideration that they had to and did in fact rely wholly upon the information and advice of the officials of the Indian Area in this whole transaction?

As to the law.

It is a well settled and recognized rule of law that in order to prove and establish conspiracy and fraud, it must be based upon the well known and recognized preponderance of the evidence of the five points. The Supreme Court of Oregon, in *Castleman v. Stryker et al.,* 107 Oregon 48, at page 60 quoted from *"Kerr on Fraud and Mistake":*

> "The Law in no case presumes fraud. The presumption is always in favor of innocence and not of guilt. In no doubtful matter does the court lean to the conclusion of fraud. Fraud is not to be assumed on doubtful evidence. The facts constituting the fraud must be clearly and conclusively established. Circumstances or mere suspicion will not warrant the conclusion of fraud. The proof must be such as to create belief and not merely suspicion. If the case made out is con-

> sistent with fair dealing and honesty, the charge of fraud fails."

and the same Court, in *Miller et ux. v. Protrka et ux.*, 193 Oregon 587, cited the above case on page 592 and others, in support of this decision.

The law never presumes fraud. It is never assumed on doubtful evidence.

The Rules of Civil Procedure, District Court, Rule 9(6):

> "The Averments of Fraud. The circumstances constituting fraud or mistake shall be stated with particularity. To rescind a sale for fraud, the fraud must be established by a preponderance of the evidence, and evidence must be clear, cogent and convincing, positive and satisfactory."

The appellants repeatedly asked the Court to point out any conspiracy to defraud appellees in the record. It seems to us under the evidence that there is no proof to support such a finding that these appellants or either of them knew or ever met any of the parties interested in the sale of this Indian land before the sale. There is no proof that either of appellants knew or were aware of anything illegal whatsoever. Siniscal was merely made a tool whereby this sale was consummated. What interest did appellant Reed have to do with this matter to charge him with being guilty of conspiracy and fraud?

The appellees are trying to evade the real issue in this case, in this, that they endeavor to have the Court believe that these appellants were the real parties who

had conspired together to defraud these appellees, when in fact appellants never heard of the Taylors until they appeared at the Indian Bureau to close the deal for this land. Nor did they see or know Brenner, Marsh or Flinn, except Reed met Flinn at the time Alexander and Reed saw Blanford for a few minutes at Newport, when he wanted Reed to act for his buyer that he might find in the latter part of July, 1951.

Fraud and deceit on application to remove restrictions.

This subject has already been covered heretofore in this brief. The testimony of Pryse and La France will cover this point. The sole purpose of this application to remove restrictions was for the information of the Indian Bureau, in order to find out as to whether Siniscal had the ability and competency to handle this land and timber after she acquired title. The form used was a local one for its own use, and not anything the Government required. The testimony of Pryse and La France fully corroborates this fact which it is also apparent from their testimony that they were of the opinion that they had followed the law in the past and since this sale, as to the procedure and methods in the sale of Indian allotted lands and they inquired of the Court if they were in the wrong, for the Court to advise them.

XII.

DID THE COURT ERR IN NOT DISMISSING THIS SUIT?

The Court erred in not decreeing that inasmuch as the land had been sold by the Indian Bureau, with the consent of the appellees, and the $135,000 had been paid to them, that they were fully satisfied. The appellees had spent a considerable portion of it and had a guardianship appointed over them in the state Court. Some of the timber had been cut down on the land, and expenses incurred thereon. The Indian appellees were paid monthly allowances even after this case had been filed. The Indian Bureau had deduced 10% for its services, and other steps were taken to dispose of the matter. The patent was issued to Siniscal on September 26, 1951, for this land by the Secretary of the Interior. That in good conscience and equity the suit should have been dismissed by the Court, and these allottees be permitted to enjoy the benefits therefrom in their old days. They wanted a home to live in during their old days, as they never had one.

CONCLUSION.

It is just about impossible to write an orderly brief and argument in this case. The whole transcript of record is a mess of entanglements. The issue of fraud, for instance, is continually mixed into every issue throughout the entire transcript of record. The same is true with the issue of the appraisal and likewise

the procedure and the methods of the Indian Area in the sale of allotted lands. No wonder Secretary of the Interior McKay made the public statement, in substance, "that the whole Indian Affairs needs a housecleaning, and the Indians should be set free from all entanglements which now surround them and prevent them from becoming free American citizens to which they were as a matter of right entitled to long ago."

Family units in the ownership of Indian property have always been encouraged by the Government.

A liberal construction of Indian laws in the interests of a weak and defenseless people is the interest and purpose of the Government.

14 *R.C.L.* 136, Section 32;

Red Bird v. U. S., 51 L. Ed. 96, and other citations under Point 14.

Dated, Portland, Oregon,
July 8, 1953.

Respectfully submitted,

Louis E. Schmitt,

Francis F. Yunker,

Attorneys for Appellants.

No. 13681

In the United States Court of Appeals for the Ninth Circuit

ERNESTINE C. SINISCAL AND ELMER A. REED, APPELLANTS

v.

UNITED STATES OF AMERICA, AS TRUSTEE AND GUARDIAN AND EX REL. OF THE ESTATES AND PERSONS OF JASPER GRANT AND HAROLD F. THORNTON; HENRY B. TAYLOR AND ELIZABETH A. TAYLOR, HUSBAND AND WIFE; WILLIAM F. BRENNER AND FRED M. MARSH, APPELLEES

UNITED STATES OF AMERICA, AS TRUSTEE AND GUARDIAN AND EX REL. OF THE ESTATE AND PERSONS OF JASPER GRANT AND HAROLD F. THORNTON, APPELLANT

v.

ERNESTINE C. SINISCAL, ELMER A. REED, HENRY B. TAYLOR AND ELIZABETH A. TAYLOR, HUSBAND AND WIFE, AND S. D. ALEXANDER, APPELLEES

UPON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES, APPELLANT

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In the United States Court of Appeals for the Ninth Circuit

No. 13681

Ernestine C. Siniscal and Elmer A. Reed, appellants

v.

United States of America, as Trustee and Guardian and Ex Rel. of the Estates and Persons of Jasper Grant and Harold F. Thornton; Henry B. Taylor and Elizabeth A. Taylor, Husband and Wife; William F. Brenner and Fred M. Marsh, appellees

United States of America, as Trustee and Guardian and Ex Rel. of the Estate and Persons of Jasper Grant and Harold F. Thornton, appellant

v.

Ernestine C. Siniscal, Elmer A. Reed, Henry B. Taylor and Elizabeth A. Taylor, Husband and Wife, and S. D. Alexander, appellees

UPON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES, APPELLANT

OPINION BELOW

The district court did not write an opinion. The findings of fact and conclusions of law appear at R. 55-63.[1]

[1] At R. 20-27 are certain facts agreed to by all parties with the exception of appellees Reed and Siniscal, plus other facts agreed to by the Government and appellee Alexander. When the court made its ultimate findings and conclusions after trial, it expressly found as true all such facts contained in the Pretrial Order except that it made a minor amendment in one of them (R. 55-56).

JURISDICTION

The jurisdiction of the district court of this suit brought by the United States rests upon 28 U.S.C. sec. 1345. The trial court's first judgment of July 18, 1952, not printed in the record, was superseded by an amended judgment and decree entered July 28, 1952 (R. 66-69). A motion to amend the findings, conclusions and judgment in certain particulars was filed by the Government on July 28, 1952 (R. 64-65). On September 30, 1952, the court further amended its conclusions and judgment by interlineation (R. 69-70). A second motion to amend was filed by the Government following this amendment of the conclusions and judgment. This motion was denied on October 1, 1952 (R. 70). The earlier motion to amend was denied by the court on September 30, 1952, the date of its final judgment, but a formal order of denial was not entered until November 19, 1952 (R. 72). A notice of appeal was filed by appellee Siniscal on November 6, 1952, and this cross-appeal by the United States was by notice filed on November 20, 1952 (R. 73-75). The jurisdiction of this Court rests upon 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether a court which, at the suit of the United States, adjudges as void, because of fraud and violation of federal laws, certain instruments purporting to transfer out of the United States its title to real property constituting Indian allotments held by the Government under trust patents for its Indian wards, may require the Government to sell the restricted property in suit to restore to the defendants the consideration paid by them for the unlawful transfer.

2. Whether, if such a requirement can be sustained

on any theory, it was error for the court below to award to the defendants, as against the Government, interest from the date of the judgment until payment is made.

STATEMENT

On March 12, 1952, this action was instituted by the United States, on behalf of its dependent Indian wards Jasper Grant and Harold F. Thornton, against Henry B. Taylor, Elizabeth A. Taylor, Ernestine C. Siniscal, Elmer A. Reed, William F. Brenner, Fred M. Marsh and others unknown to cancel certain instruments purporting to transfer to the Taylors the title to 800 acres of valuable timber land in Curry County, Oregon, held by the United States under trust patents for the benefit of Grant and Thornton.

The judgment was, for the most part, favorable to the United States. For purposes of the Government's cross-appeal it is necessary only to summarize the pleadings. The Government's complaint (R. 3-11) sought cancellation of the following documents: (1) an order of August 7, 1951 (Ex. 5, R. 163) purporting to transfer the inherited interests of Grant and Thornton (the Indians for whom the Government holds the land under General Allotment Act patents) to appellee Siniscal; (2) an order of the same date removing restrictions on appellee Siniscal (Ex. 4, R. 181); (3) a deed of the same date from Siniscal to appellees Taylor (Ex. 3, R. 438), and (4) an option of the same date from the Taylors to Brenner and Marsh to purchase the land for $300,000.00 (Ex. 6, R. 109). The Government charged a conspiracy by the defendants to secure a transfer of the property for $135,000.00, a price known to them to be grossly inadequate. It alleged that the defendants knowing that a transfer of inherited in-

terests could only be made to a bona fide Indian purchaser,[2] fraudulently represented appellee Siniscal (an unallotted Siletz Indian) as a bona fide purchaser, and also falsely represented that the $135,000.00 paid for the property was money belonging to Siniscal. In reliance upon such false representation E. Morgan Pryse, Area Director of the Indian Office in Portland, Oregon, was deceived, misled, and induced to sign the order transferring the interests of the Indians Grant and Thornton to Siniscal. It was further alleged that the property was actually worth in excess of $350,000.00, and that the order transferring inherited interests was beyond the authority of Pryse, the Area Director.

In the Taylors' answer (R. 12-15), the status of the property as held by the Government in trust for Indian wards under General Allotment Act patents when this transaction was started was not questioned, execution and recordation of the instruments was admitted, but the allegations of conspiracy, fraud, overreaching, or other illegality were denied. Answers in substance the same were filed by appellee Reed and his daughter Siniscal (R. 15-17, 18-20).

Appellee Alexander intervened. He exhibited as the foundation of his claim an agreement with Reed to do the very thing the Government alleged had effected the purported sale to the Taylors (Pretrial Ex. 34, Fdg. 7, R. 23, Fdg. X, R. 59). This contract provided that Reed, as an Indian purchaser, would take title, paying $135,000.00 to be supplied by Alexander, and then convey the property to Alexander, who would pay Reed $12,500.00 for his services. Alexander's complaint

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[2] Otherwise, the land could be sold only after public auction (Fdg. IX, R. 58).

alleged that the defendants with the help of Clyde W. Flinn, then Realty Officer at the Indian Agency, had conspired to take over his project by substituting Reed's daughter as the strawman (a switch attractive to Reed and his daughter Siniscal by reason of raising the payment to Siniscal to $25,000.00 (Fdg. 4, R. 24-25)) and sought to compel a conveyance to him (R. 45-48). Lengthy trial proceedings ensued, at the conclusion of which the court below made the following findings and conclusions:[3]

The property involved was, at all times here in question, held by the United States under trust patents issued under the General Allotment Act of February 8, 1887, 24 Stat. 388, in trust for Grant and Thornton, Indian wards of the United States (Fdg. 2, R. 21-22). Prior to August 7, 1951, appellees Henry B. and Elizabeth A. Taylor agreed to pay the sum of $25,000.00 to whatever Indian person delivered to them title to the property in this case; a cashier's check for that amount, payable to appellee Ernestine C. Siniscal was obtained by Elizabeth A. Taylor and on August 7, 1951, was placed in escrow under an agreement between the Taylors and Siniscal to deliver the check to Siniscal upon the acquisition of an approved title by the Taylors. A check for $135,000.00 payable to the Treasurer of the United States, was given as consideration for the land

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[3] The Government placed in evidence the depositions of four of the defendant-appellees, Elizabeth A. Taylor (R. 821-839), Henry B. Taylor (R. 842-925), Elmer A. Reed (R. 927-998), and Ernestine C. Siniscal (R. 778-819). The Government used defendant Brenner as a witness (R. 82-131), and also sought enlightenment by calling defendant Marsh (R. 498-504), John C. Blanford (R. 505-509) associated with the appellees in this transaction (Fdg. 5, 9, 11 and 13, R. 25-27), and Clyde W. Flinn (R. 510-515), former Area Realty Officer at the Indian Office in Portland, but all these declined to testify on the ground of self-incrimination.

(Fdg. 4, R. 24-25). (This check (Ex. No. 1, R. 194) shows on its face it was a cashier's check purchased by appellee Henry B. Taylor.)

The Order Transferring the Inherited Interests of Jasper Grant and Harold F. Thornton (Ex. No. 5, R. 163-166) was employed in this case for the first time in relation to trust allotted lands and purported to convey the inherited interest of Grant and Thornton in the trust allotted lands to Ernestine C. Siniscal by language conveying a restricted fee title (Fdg. III, R. 56-57). The significance of this finding resides in the fact that this order was copied from either of two standard forms regularly used by the Indian Service. But whereas, under the last paragraph of either of these regular forms (Ex. 21, R. 160-163, Ex. 22, R. 166-169), the title to the property remained in its prior status, i.e., fee title in the United States in trust for the benefit of Indians, under the order employed in this case a different paragraph was devised which purported to vest in Siniscal the fee title with a restriction against alienation (Ex. 5, R. 163-166). However, fee title was in the United States and no fee patent has ever been issued by the United States (Fdg. IV, R. 57). The authority of E. Morgan Pryse to sell the property is contained and limited by Order 551, 16 Fed. Reg. 2939 and Title 25, C.F.R. (Fdg. II, R. 56).

"Ernestine C. Sinistine (sic), at the time of the transaction herein involved, was acting as a mere agent for hire and as a conduit for title in behalf of defendants Taylor; she was not purchasing on her own behalf or for her own account and was not an Indian within the meaning and intent of the regulations contained in C.F.R. 25, Part 241, and in particular Section

241.11" (Fdg. V, R. 57). On August 6, 1951, appellee Siniscal, accompanied and assisted by her father, appellee Reed, submitted information to one La France, employee of the United States in the Swan Island Indian Agency, in connection with an application by Siniscal for removal of restrictions on the property here involved (Fdg. 3, R. 24, Ex. No. 9, R. 172-177). "False representations as to the actual status, financial responsibility, and intentions of Ernestine C. Siniscal were made to the Bureau of Indian Affairs and E. Morgan Pryse, Area Director, by defendants Taylor and their agent Ernestine C. Siniscal, and others, at the time the transaction involved herein occurred, and prior thereto" (Fdg. VI, R. 57). "The defendants Taylor and their agent, Ernestine C. Siniscal, and others, at the time this transaction occurred, concealed from the Bureau of Indian Affairs and E. Morgan Pryse, Area Director, the fact that the defendants Taylor were in truth the real buyers concerned in this transaction." (Fdg. VII, R. 58).

"The consideration in this transaction, $135,000.00, was grossly inadequate and shocking to public conscience and the Area Director, E. Morgan Pryse, at the time he signed the documents involved in this transaction, was unaware of the true value of the property involved herein" (Fdg. VIII, R. 58). "The evidence in this case clearly, certainly, and convincingly establishes the fact that defendants Taylor, and those persons acting in concert with them, were aware of the necessity of the requirement for a publicly advertised sale unless the property were purchased by a bona fide Indian on his or her own behalf and account, and that in order to avoid such requirement, Ernestine C. Siniscal was

by subterfuge presented as an actual bona fide purchaser, and the true identity of defendants Taylor as purchasers was concealed" (Fdg. IX, R. 58). "In reliance upon the fraudulent representations of the defendants Taylor and persons acting in concert with them, and by reason of the concealment by the aforesaid persons, all as set forth in Findings V to IX, inclusive, herein, E. Morgan Pryse, Area Director, signed the Order Transferring Inherited Interest and the Order Removing Restrictions, which he would not have done had he known the true facts" (Fdg. XI, R. 59).

The trial court drew the following conclusions: Appellee Siniscal, being merely an agent or conduit through whom the Taylors intended to acquire the trust property here involved, was not an Indian within the meaning of the law and regulations promulgated by the Secretary of the Interior, particularly Section 241.11, C.F.R. (Concl. II, R. 60). The Order Transferring Inherited Interests to Siniscal (Ex. No. 5, R. 163-166) and the Order Removing Restrictions (Ex. 4, R. 181-183) were beyond the authority of E. Morgan Pryse as Area Director and are null and void (Concl. III, R. 60). The deed from Siniscal to the Taylors and the contract between Siniscal and the Taylors are null and void under 25 U.S.C. 348.[4] (Concl. IV, R. 60). By reason of the fraudulent misrepresentations made to the United States and its agent E. Morgan Pryse by the Taylors and those acting in concert with them, and the concealment by them of pertinent facts from Pryse, and by reason of the fact that the sum of $135,000.00 was a grossly inadequate price for the property, the

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[4] This citation appears in the record as *23* U.S.C. 348, clearly an inadvertent error.

entire transaction should be rescinded (Concl. VI, R. 61). The court further concluded that the Government was entitled to a judgment and decree declaring null and void and setting aside the Order Transferring Inherited Interests, the Order Removing Restrictions on Ernestine C. Siniscal, the deed from Siniscal to the Taylors dated August 7, 1951, a later deed from Siniscal to the Taylors, dated August 10, 1951, the option agreement of August 7, 1951, under which the Taylors gave an option to Brenner and Marsh to purchase the property for $300,000.00, and also the escrow agreement relating to the $25,000.00 placed in escrow for Siniscal by the Taylors, "and any and all other instruments or papers in connection with this purported sale to the defendants Henry B. Taylor and Elizabeth A. Taylor" (Concl. VII, R. 61-62).

The trial court also made the following conclusions (R. 62-63) which give rise to the questions raised by the United States on this appeal:

VIII

> That the lands and timber involved in this suit including the logs felled and not removed from said property shall be duly advertised and sold to the highest bidder by the Bureau of Indian Affairs of the Department of the Interior and out of the proceeds there should be deducted the expenses of such sale.

IX

> Good cause exists for the return to Henry B. Taylor and Elizabeth A. Taylor the sum of $135,000.00, together with interest at the rate of 6% per annum from July 18, 1952, by order of Court 9/30/52, turned over by them to the Area Director of the Bureau of Indian Affairs for the account of Harold Thornton and Jasper Grant.

X

Such amount is to be paid said Taylors from the following sources:

1. All money belonging to Jasper Grant and Harold F. Thornton and now in the possession of the Portland Trust & Savings Bank as Conservator of said Indians shall forthwith be turned over to Henry B. Taylor and Elizabeth A. Taylor.[5]

2. The lands and timber involved in this suit, including the logs felled and not removed from said property, shall be duly advertised and sold to the highest bidder by the Bureau of Indian Affairs for the Department of the Interior. From the money so received, after payment of expenses of the sale, the difference between the amount turned over to the Taylors by the Portland Trust & Savings Bank and $135,000.00 shall be paid to Henry B. Taylor and Elizabeth A. Taylor.

Judgment was entered in accordance with these findings and conclusions (R. 66-69). By an appropriate motion (R. 64-65) the United States asked the court below to strike conclusions VIII, IX and X and companion provisions of the judgment. When on September 30, 1951, the court below by interlineation (R. 70) added the requirement that interest be also paid to the Taylors, the Government filed a second motion attacking this provision. Both motions were denied (R. 70, 72). On November 6, 1952, appellant Siniscal filed a

[5] Evidence in the case established that of the $135,000.00 paid by the Taylors, $55,000 was disbursed to the Indians. The remaining $80,000 was delivered to the Conservator bank, which holds this and presumably whatever part of the $55,000.00 the Indians had retained at the time the Conservator was appointed in proceedings in the State court.

notice of appeal, and on November 20, 1952, the Government countered with a cross-appeal (R. 71, 73-75).

SPECIFICATIONS OF ERROR

The United States makes the following specifications of error as set forth in its statement of points to be raised on its cross-appeal (R. 1003-1004):

1. The trial court erred in finding (Fdg. XII, R. 59) that good cause exists for the return to the Taylors of the consideration paid by them, for the reason that such finding shows on its face that it is a mere conclusion of law, and for the further reason that it is not supported by the evidentiary findings of the court below.

2. The trial court erred in concluding (Concl. IX, R. 62) that good cause exists for the return of the consideration to the Taylors and in concluding (Concl. X, R. 63) that the Government must sell the property for that purpose, for the reason that the court could not condition the granting of relief to the United States upon return of the consideration, nor accomplish the same result indirectly by ordering sale of the property for the purpose of securing such return.

3. The court erred in entering that part of its judgment which orders that the lands and timber involved in this suit be sold by the United States and that a portion of the money so received be turned over to the Taylors.

4. The trial court erred in adjudging that interest on the sum of $135,000.00 from July 18, 1952, until paid, should be paid to Henry B. Taylor and Elizabeth A. Taylor.

ARGUMENT

I

Where Deeds or Other Instruments Purporting to Divest the Government's Title to Indian Allotments Held by the United States in Trust for its Indian Wards Are Void, Because of Fraud in Their Procurement or Because They Violate Federal Laws and Regulations for the Indians' Protection, the Government is Not Obliged to Restore the Consideration Paid for Such Conveyances and May Not be Required to do so or to Sell the Allotments for that Purpose.

This is an action by the United States against appellees Taylor and others to have declared null and void certain instruments purporting to vest in the appellees Taylor a title to property held by the United States for the benefit of Indians under trust patents issued under the General Allotment Act of February 8, 1887, 24 Stat. 388. The trial court has decreed that the transaction challenged by the Government is void on two grounds, (a) that fraud and misrepresentation were practiced upon agents of the United States in procuring the instruments upon which the defendants assert their title, and (b) on the ground that the issuance of such instruments by government agents was beyond their authority, with the result that such instruments are violative of federal laws, regulations and restrictions relating to such property. The court below, however, in addition to entering judgment voiding the instruments complained of, further decreed that the appellees Taylor must be made whole by having restored to them the $135,000.00 paid by them as consideration for the property, and that the United States, through its Secretary of the Interior, must sell the property sued for and apply the proceeds of such sale to the partial payment of the amount adjudged to the

Taylors.[6] These provisions requiring the Government to repay the Taylors and ordering the Government to sell the property cannot be sustained.

A. *The court could not condition relief to the United States upon restoration to the Taylors of the consideration paid by them:*—Preliminarily, it should be remembered that property held by the United States under trust patents for Indian benefit is, like any other federal property, an instrumentality for the execution of governmental policies of the United States and enjoys the same immunities. Thus property so held for Indian benefit under a General Allotment Act trust patent is "an instrumentality employed by the United States for the benefit and control of this dependent [Indian] race" and, just as other federal property, is immune from taxation by any local or state government without the consent of Congress, since otherwise the lands would "become so burdened that the United States could not discharge its obligations to the Indians without itself paying the taxes imposed from year to year, and thereby keeping the lands free from incumbrances." *United States* v. *Rickert,* 188 U.S. 432, 437-438 (1903). And in *Minnesota* v. *United States,* 305 U.S. 382, 386 (1939), involving property so held by the Government, the court stated that "a proceeding against property in which the United States has an interest is a suit against the United States" and held that such property is immune, just as is other federal property, from the State's power of eminent domain

[6] Under the judgment the United States is required to pay whatever portion of the $135,000 is not paid by the Portland Trust and Savings Bank. Since that company holds $80,000, the United States is required to pay over at least $55,000 plus interest and possibly more. See *supra,* fn. 5, p. 10.

unless Congress has consented to condemnation proceedings. Hence there is no difference in the federal interest, immunities, and rights, between the property held as here in trust for Indian wards and any other federal property. But rights are insecure if remedies for their violation are absent, and it would be strange indeed if the Government's remedies, when it seeks to protect its property by judicial proceedings against those who assert title to it under deeds which either violate federal laws or were procured by fraud, should be less in the case of one class property than in the other. That the Government's remedies are not different is demonstrated conclusively by the following decisions of the Supreme Court of the United States dealing with the precise question here presented in cases involving both public lands of the United States and property held by the Government as an instrumentality for Indian benefit.

Sixty-odd years ago the Supreme Court in *United States* v. *Trinidad Coal Co.,* 137 U.S. 160 (1890), dealt with the following situation: The laws of the United States permitted, under specified conditions, the entry of coal lands of the United States by an individual, but limited the acreage subject to such entry to 160 acres. An "association of persons" could legally enter only 320 acres. Certain officers and employees of the coal company filed individual entries totalling around 954 acres, and in reliance upon such filings the Government issued patents. The entire purchase money under these entries was paid by the company to the entrymen, who then paid it to the Government, the company having taken warranty deeds covering all of the lands from the supposed individual entrymen. Also involved

were false representations on the part of at least one entryman as to his qualifications as an entryman. The court held the entries to be both fraudulent and violative of federal land laws. There the same contention was made that apparently moved the court below, that the Government must refund the monies paid to it in order to obtain the relief it sought. The court rejected the suggestion, stating (pp. 170-171):

> It is contended by the defendant that the United States * * * asking equity, must do equity; and, consequently, that the bill is defective in not containing a distinct offer to refund the moneys which, it is alleged, were furnished by the defendant to the several persons to whom patents were issued. The rule referred to should not be enforced in a case like the present one. In the matter of disposing of the vacant coal lands of the United States, the government should not be regarded as occupying the attitude of a mere seller of real estate for its market value. * * * the defendant is a wrongdoer against whom the government seeks to vindicate its policy in reference to the development of its vacant coal lands. * * * If the defendant is entitled, upon a cancellation of the patents fraudulently and illegally obtained from the United States, in the name of others, for its benefit, to a return of the moneys furnished to its agents in order to procure such patents, we must assume that Congress will make an appropriation for that purpose, when it becomes necessary to do so. *The proposition that the defendant, having violated a public statute in obtaining public lands that were dedicated to other purposes, cannot be required to surrender them until it has been reimbursed the amount expended by it in procuring the legal title,*

> *is not within the reason of the ordinary rule that one who seeks equity must do equity; and, if sustained, would interfere with the prompt and efficient administration of the public domain.* * * * (Italics supplied.)

The question was again considered with specific application to lands held by the United States for Indians in the case of *Heckman* v. *United States,* 224 U.S. 413 (1912). There the United States sued to cancel deeds for their allotments given by Indians to third parties, on the ground that the deeds violated the restrictions on alienation imposed by the laws of the United States enacted for the protection of the Indians. The trial court sustained a demurrer on the ground that the United States had no interest entitling it to sue. *United States* v. *Allen,* 171 Fed. 907 (C.C.E.D. Okla. 1909). The court of appeals reversed (179 Fed. 13, C.A. 8, 1910) and the case was appealed to the Supreme Court *sub nom. Heckman* v. *United States,* 224 U.S. 413 (1912). In that court the argument was made that the allottees, having received consideration for the deeds, should be made parties "in order that equitable restoration may be enforced." The court rejected this, stating (224 U.S. 446-447):

> * * * Where, however, conveyance has been made in violation of the restrictions, *it is plain that the return of the consideration cannot be regarded as an essential prerequisite to a decree of cancellation.* Otherwise, if the Indian grantor had squandered the money, he would lose the land which Congress intended he should hold, and the very incompetence and thriftlessness which were the occasion of the measures for his protection would render

them of no avail. The effectiveness of the acts of Congress is not thus to be destroyed. The restrictions were set forth in public laws, and were matters of general knowledge. Those who dealt with the Indians contrary to these provisions are not entitled to insist that they should keep the land if the purchase price is not repaid, and thus frustrate the policy of the statute. *United States* v. *Trinidad Coal Co.,* 137 U.S. 160, 170, 171. (Italics supplied.)

The court proceeded to note a suggestion by the appellants that there may be instances where the Indians have property which could be reached without violating any federal policy, such as unrestricted property the Indians might own. But the court made it plain that, assuming such case, the securing of relief against the Indians could have no bearing on the right of the Government to cancellation of the illegal conveyances. In other words, irrespective of whether in a given case any rights exist as against the Indian, none exist against the Government to repayment of the consideration, as a prerequisite to its relief, and hence the question of restoration is irrelevant to the right of the Government to cancellation.[7] The *Heckman* decision was so applied in the recent case of *Hall* v. *United States,* 201 F.2d 886 (C.A. 10, 1953), by a court of appeals having wide experience in Indian litigation. A contrary rule leads to an utter absurdity. For example, an Indian

[7] The discussion in the *Heckman* decision regarding possible recourse against private property of the Indians is significant here with respect to the balance of $80,000.00 of the consideration paid, which amount Government officials turned over to the Portland Trust & Savings Bank, a conservator appointed for the Indians Grant and Thornton. The court below ordered this fund repaid to the Taylors (R. 63, 68). We do not take any position with respect to this provision of the judgment, since under the authorities cited the Government's right to relief is independent of the restoration of the consideration.

may mortgage his allotted and restricted lands to a white man for $10,000.00 without federal approval. What earthly good is the Government's right to void that mortgage if a court can burden that right by requiring the Government to sell the property and pay to the mortgage holder his $10,000.00 with interest? *To do so is to enforce the mortgage in fact while purporting to nullify it in law,* and renders the Government's right to preserve the property inviolate and unfettered for its declared purposes a myth. Cf. *United States* v. *Gilbertson,* 111 F.2d 978, 980 (C.A. 7, 1940).

The rule that the United States may not be required to return the consideration when it sues for and receives judgment annulling and cancelling a patent was again declared in *Causey* v. *United States,* 240 U.S. 399 (1915), involving a homestead entry. The Government's case was predicated on fraud on the part of the entryman in the oath and proof whereby the patent was secured. The entryman had paid, in land scrip, the statutory price of $1.25 an acre. There it was again urged that the Government, as a prerequisite to its right to relief, must tender the consideration it had received, and the court, citing the *Trinidad* and *Heckman* decisions, again rejected the contention. The court concluded its decision with this statement (p. 402):

> * * * That rule [that the plaintiff must tender and return the consideration], if applied, would tend to frustrate the policy of the public land laws; and so it is held that the wrongdoer must restore the title unlawfully obtained *and abide the judgment of Congress as to whether the consideration paid shall be refunded.* * * * (Italics supplied.)

Following the decisions of the Supreme Court in the *Trinidad, Causey* and *Heckman* cases, it fell to the lot of this Court to forge a link in the chain of authority in the celebrated case of *Pan-American Petroleum Co.* v. *United States,* 9 F. 2d. 761 (1926). There the Government sued the oil company and another corporation to void oil leases on certain naval reserve lands on the ground of fraud practiced in their procurement. An added element, not present in the prior cases, was that the fraud was practiced by the defendant corporations with the aid of an official of the United States, the then Secretary of the Interior. The trial court gave judgment voiding the leases but decreed that the defendants must be reimbursed by the Government for expenditures of around $10,000,000.00 which they had made. Both sides appealed, the Government challenging the provisions of the judgment requiring that the defendants be made whole at the Government's expense.

This Court had no trouble in deciding that the trial court erred in ordering restitution. After stating that the equitable maxim underlying the trial court's erroneous action "is only a guiding principle and not an exact rule governing all cases," this Court proceeded to point out (9 F.2d 771-772) that the prior decisions of the Supreme Court in the *Trinidad, Heckman* and *Causey* cases covered the question like a blanket and reversed the judgment insofar as it gave affirmative relief against the Government. The Supreme Court granted certiorari to review the whole case. That Court, of course, affirmed. *Pan-American Co.* v. *United States,* 273 U.S. 456 (1927). After again showing that the question was foreclosed by its prior decisions, the Supreme Court made the following statement which,

one would suppose, should have settled the point (273 U.S. at pp. 509-510):

> * * * The United States does not stand on the same footing as an individual in a suit to annul a deed or lease obtained from him by fraud. Its position is not that of a mere seller or lessor of land. *The financial element in the transaction is not the sole or principal thing involved.* This suit was brought to vindicate the policy of the Government, to preserve the integrity of the petroleum reserves and to devote them to the purposes for which they were created. *The petitioners stand as wrongdoers, and no equity arises in their favor to prevent granting the relief sought by the United States.* (Italics supplied.)

The foregoing decisions of the Supreme Court and this Court establish beyond question these propositions: (1) upon proof by the Government of the illegality of conveyances or any other instruments purporting to transfer or burden the Government's title to property, whether that property is held by the Government for the benefit of all of its citizens or for the benefit of individual Indian wards, the Government is entitled to a judgment in its favor; (2) the rule in private litigation that one seeking cancellation must tender and refund the consideration paid has no application whatever; and (3) the question of whether restoration is to be made is not a question for the courts, but is one for Congress to decide.

There is thus no uncertainty as to the law. The mystery here is what moved the trial court, in the face of such law, to conclude that "good cause exists for the return to Henry B. Taylor and Elizabeth A. Taylor,

the sum of $135,000.00, together with interest, at the rate of 6% per annum from July 18, 1952" (Concl. IX, R. 62-63).[8] That court's own findings and conclusions establish not only that the transaction by which they claimed to have acquired the property was violative of federal law, but that the Taylors were participants in a scheme to defraud the Government. The reprehensible nature of this transaction sufficiently appears from the findings and conclusions hereinbefore set out and needs no elaboration here. The case here is covered completely by the cited decisions of this Court and the Supreme Court.

B. *A restoration to the Taylors of the consideration they paid cannot be indirectly accomplished by ordering the Government to sell the property for that purpose:*—Persuaded, no doubt, by the authorities hereinbefore cited that the Government *did have* a clear right to relief without itself paying into court the consideration the Taylors had paid, the court below nevertheless undertook to place the same onus on the Government by ordering it to sell the very property it is adjudged entitled to recover. The court cannot, of course, thus accomplish by indirection the result which the authorities clearly forbid. The judgment here would frustrate federal policy to the same extent as in those cases.

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[8] The court below also in its findings of fact stated that "good cause exists" for the return of the consideration to the Taylors (Fdg. XII, R. 59). On its face this is not a fact finding but a conclusion. And the erroneous inclusion of it in the findings of fact cannot, of course, operate to subject the Government to the onus imposed on review of true findings by Rule 52(a), F.R.C.P. The question is shown by the cases hereinbefore discussed to be purely a legal question, and neither this Court's power, nor that of the Supreme Court, fully exercised in the cited cases, to redress an error in conflict with them, can be thus impaired. Moreover, there is nothing in the other findings to indicate of what the "good cause" consisted.

Moreover, the court thus not only misconceived the course of action open to it under the principle relied on by the Taylors, i.e., withholding relief to the United States until the consideration shall be paid, but has in the process attempted to exercise a non-existent power. This follows because the property, as adjudged by the court, is federal property, the disposition of which lies solely within the control of the Congress. Const. Art. IV, Cl. 3. It follows that disposition of such property may be made only in the manner allowed by Congress. With regard to property of the character here involved—inherited trust allotments—Congress has provided for their sale during the trust period, but has authorized not the courts but the Secretary of the Interior so to dispose of them *in his discretion.* Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C. sec. 372.

The court below exhausted its power when it determined and adjudged that the Government was entitled to a judgment that the property is still property of the United States, and its attempt then to order sale by the Secretary of the Interior is, we submit, a usurpation of discretionary authority placed by Congress solely in that officer of the United States.

II

The Action of the Court in Allowing Interest at 6% from the Date of Judgment is Unjust and Erroneous.

By the amended judgment of July 28, 1952 (R. 66-69), the court below ordered return of the consideration to the Taylors, and two months later, by interlineation, inserted in the conclusions and judgment a requirement that the Taylors also be paid interest at the rate of 6%

from July 18, 1952, the date of the first judgment entry (R. 69-70). We submit that such action is entirely unjustified in the circumstances of this case.[9] That the Government should be required to act as a banker and pay the Taylors 6% on the money used by them in the execution of an illegal transaction is fantastic. It should not be countenanced unless it is clearly mandatory.

Absent statutory authority, interest on judgments does not lie against the federal government. *United States* v. *Sherman,* 98 U.S. 565, 567-568 (1878). And although the award of interest here in question expends itself on property held by the United States in trust for the benefit of Indian wards of the Government, it is still a judgment against the United States for which Congressional consent must be given. Cf. *Minnesota* v. *United States,* 305 U.S. 382, 386 (1939). Hence, to support the award of interest in this case it is mandatory that in some way it be shown that Congress has authorized the award of interest now challenged. We do not know of any statute which might possibly be construed to allow interest in this case.

Moreover the present case is clearly outside of the policy which underlies the enactment of statutes allowing interest on judgments. "* * * whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor." *United States* v. *Sherman,* 98 U.S. 565, 567 (1878). Interest is allowed for delay in payment chargeable to the judgment debtor. Here the court below has made an order

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[9] The Court does not reach this question if it sustains the first proposition that the Government cannot be required to make restitution to the Taylors through sale of the property.

whose execution, *under the terms of the order itself,* imposes a delay in payment which the Government cannot avoid and for which it should not be penalized. Thus, assuming the order to be valid, it will take time to comply with it by advertising and selling at public sale. While, if the property must be sold, a sale under competitive bidding is a salutary requirement, the resultant delay in payment is surely not chargeable to the Government. There is another type of delay which stems from the circumstance that the Government cannot safely proceed under the judgment until this litigation is finally laid to rest. For example, the action of appellee Siniscal in filing an appeal of itself precluded compliance with the judgment. As between the Taylors and the United States, the responsibility for this situation is clearly on the Taylors. The Government has been put to the necessity of litigating, not by choice, but by the actions of the Taylors and their associates. And even if the order to make restitution through sale of the property were sustained, we insist that the burden of delay properly belongs on the Taylors, and that the imposition of interest in the meantime is not supported, as it must be, by statutory authority, or by logic.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment, insofar as it requires the Government to restore the consideration to the Taylors, orders the sale of the property for that purpose, and awards interest against the Government, should be reversed.

Respectfully,

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June, 1953

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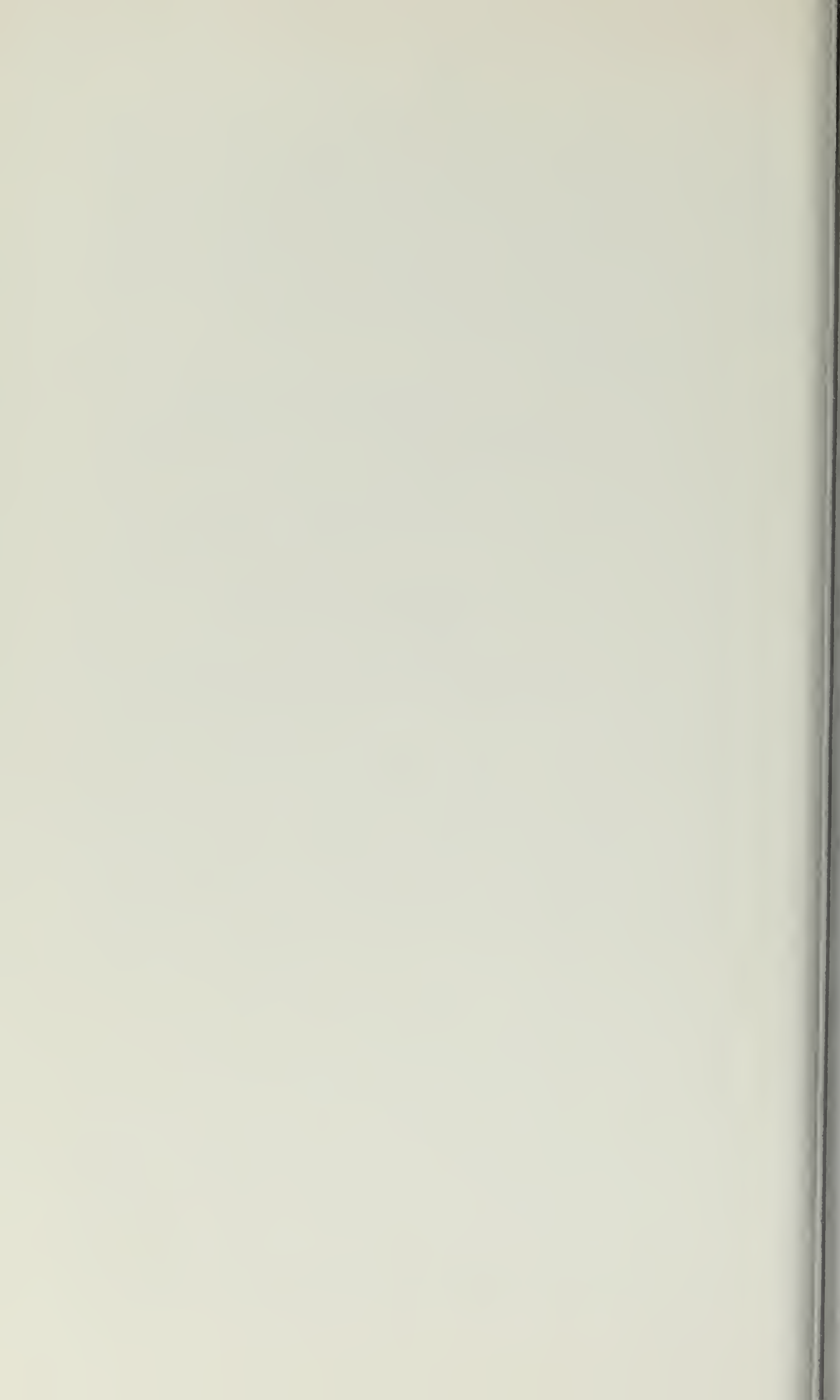

No. 13681

United States Court of Appeals

For the Ninth Circuit

ERNESTINE C. SINISCAL AND ELMER A. REED,
Appellants,

v.

UNITED STATES OF AMERICA, AS TRUSTEE AND GUARDIAN AND EX REL. OF THE ESTATES AND PERSONS OF JASPER GRANT AND HAROLD F. THORNTON; HENRY B. TAYLOR AND ELIZABETH A. TAYLOR, HUSBAND AND WIFE; WILLIAM F. BRENNER AND FRED M. MARSH,
Appellees.

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Appellant,

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Appellees.

Upon Appeals From the United States District Court for the District of Oregon

Brief for Appellees Henry B. Taylor and Elizabeth A. Taylor, Husband and Wife, in Answer to Appellants and Cross Appellant The United States of America, as Trustee and Guardian and Ex Rel. of the Estates and Persons of Jasper Grant and Harold F. Thornton

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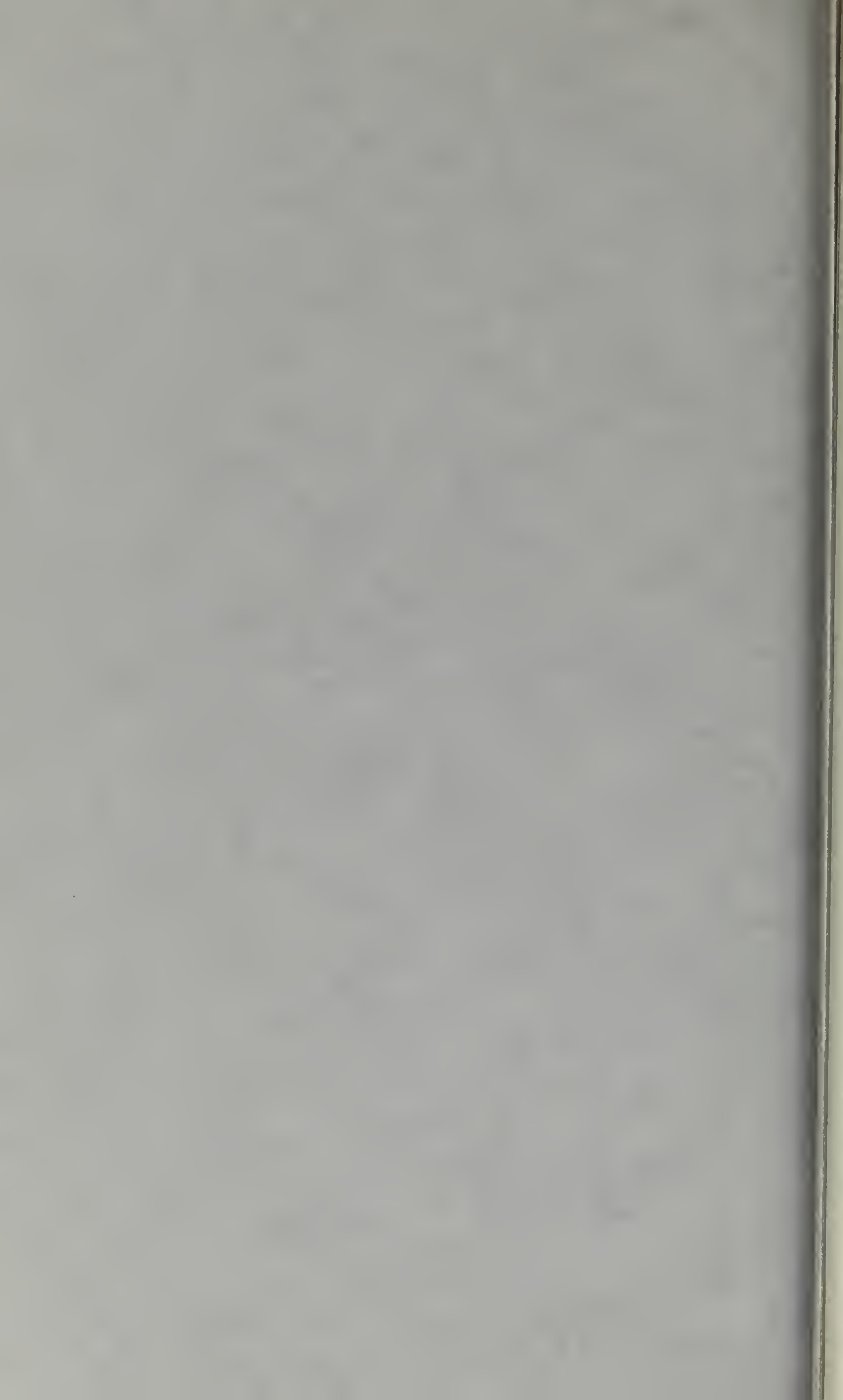

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PREFACE

We have incorporated under the same cover the responding Brief of Appellees Taylors to that of Appellants and Cross Appellant. We have identified

appropriately the part relating to the contentions of each, the Appellants and the Cross Appellant.

* * *

STATEMENT OF THE CASE

We are offering the following Statement of Facts showing the more pertinent circumstances and events in their sequence as to time; persuaded that it may be of some aid to the Court for a better understanding of the question before it, the question being: What title or interest to the land in question was vested in the Appellees Taylors as of the time this suit was instituted?

Cross Appellant, by its Complaint, alleges that the land in question was Indian allotment land held under trust patents, and that the documents issued by the Portland Office of the Bureau of Indian Affairs were ultra vires, and that they were procured through fraud upon the Bureau's officials and agents, and, therefore, they are void and convey no right or interest to Appellant Ernestine C. Siniscal and her successors in interest, Appellees Taylors.

The source of the interest in the title of Appellees Taylors finds its beginning in trust patents (Ex. 53) for allotments issued (Agreed Facts, Para. II., R. 21) on December 21, 1895 to Sandy Grant, Eliza Grant, Chancey Grant, Clara Grant and Captain Jack, Indians of the Rogue River Tribe. Upon the death of these Indians, their interests, pursuant to determination by the Secretary of the Interior, were declared to be (R. 22) in Jasper Grant and Harold F. Thornton (Ex. 54) as heirs of such allottees, each

taking an undivided one-half interest in the several allotments.

From twenty to thirty years before the sale herein referred to was made, the Indians had been trying to sell the property in question (R. 556).

On May 16, 1951, Patrick L. Gray, a Forester of the Land Department of the Bureau of Indian Affairs, filed his appraisement (Ex. 13, R. 144) certifying the value of the land in question to be $135,000.00.

On July 13, 1951 (R. 152), Jasper Grant and Harold F. Thornton signed and filed with the Portland Office of the Bureau of Indian Affairs their respective Consents (Exs. 13 & 12, R. 157 & 155) to sell the land in question for $135,000.00, each to receive the sum of $67,500.00 as his proportionate share.

On August 3, 1951, one William F. Brenner, initially one of the defendants in this suit (R. 663 & 859) came to the ranch of Appellees Taylors in the vicinity of Antelope, Oregon (R. 661) and solicited them to help finance the buying of timber land in Curry County, Oregon.

On August 5, 1951, (R. 686 & 865), Appellee Henry B. Taylor went to Gold Beach, Oregon, and inspected the land.

On August 7, 1951, at about one o'clock P. M. (R. 881), Appellant Ernestine C. Siniscal, accompanied by her attorney and Appellee Henry B. Taylor, met in the office of the latter's attorney, at which time Appellant Ernestine C. Siniscal signed a Deed (Ex. 3, R. 436) to the land in question in

favor of Appellees Taylors, and at that time agreed to sell the property to the Appellees Taylors for the sum of $160,000.00. The executed Deed was at that time left in the custody of Appellant Ernestine C. Siniscal's attorney (R. 669) to be held until the transaction was consummated.

On August 7, 1951, and after the meeting referred to in the last paragraph, at about two o'clock P. M. (R. 884), Appellant Siniscal, in company with her attorney and Appellee Henry B. Taylor, went to the Portland Office of the Bureau of Indian Affairs, at which time Appellee Henry B. Taylor gave to F. E. LaFrance, Clerk in the Portland Office of the Bureau of Indian Affairs a cashier's check (Ex. 1, R. 194) for $135,000.00. At that time, Appellant Siniscal, an enrolled Indian (Ex. 61-D), signed an Application to Remove Restrictions (Ex. 9, R. 172) which had been prepared by Mr. LaFrance, the Clerk in the Portland Office. Mr. LaFrance also prepared an Order Transferring Inherited Interests (Ex. 5, R. 163) and an Order Removing Restrictions (Ex. 4, R. 163), and these, together with other documents including the Certificate of Appraisement, were presented to E. Morgan Pryse, the Area Director of the Bureau of Indian Affairs, and which he thereupon signed (R. 342 & 343). At that time Appellant Ernestine C. Siniscal was given the Order Transferring Inherited Interests (Ex. 5) and the Order Removing Restrictions (Ex. 4) and the Receipt for $135,000.00 (Ex. 73). The latter recited that the check (Ex. 1, R. 194) was from Appellee Henry B. Taylor, and that the deposit was to be held pending approval of the Deed and the removal of restrictions as to Allotments R-80, 82, 83, 84 and 103.

On August 7, 1951, and after the transaction at the Portland Office of the Bureau of Indian Affairs referred to in the preceding paragraph (R. 670), Appellant Siniscal and her attorney went with Appellee Henry B. Taylor to the office of the latter's attorney (R. 670) at which time the Deed (Ex. 3, R. 436) was delivered to Appellee Henry B. Taylor, and Appellant Siniscal and the Appellees Taylors signed an Escrow Agreement (Ex. 2-A, R. 433) whereby a check for $25,000.00 (Ex. 2-B, R. 441) in favor of Appellant Siniscal was placed in the custody of the United States National Bank of Portland (Oregon) as Escrow Agent on the condition that the same was to be delivered to Appellant Siniscal upon an opinion being given by the attorney for Appellees Taylors that the Taylors were vested with a merchantable title.

At this same time, the Order Transferring Inherited Interests (Ex. 5) and the Order Removing Restrictions (Ex. 4) also were delivered to Appellees Taylors or their attorney, and they were immediately placed of record, as is evidenced by the endorsement of the County Clerk of Curry County on the several documents, that is, Exhibits 3, 4 and 5.

On August 7, 1951, and some time after the transaction last referred to, the Appellees Taylors gave to William F. Brenner and wife and Fred M. Marsh and wife an Option (Ex. 6, R. 109) whereby the latter were privileged to purchase the property in question for $300,000.00 on or before March 10, 1952. This document also was placed of record immediately, as evidenced by the filing date thereon.

On August 7, 1951, and while the foregoing was taking place in the office of the attorney for Appellees Taylors, the Portland Office of the Bureau of Indian Affairs (R. 191, 192 & 346) transmitted with covering letters (Exs. 14 & 15) to the Land Department of the Bureau of Indian Affairs, Washington, D.C., duplicates of the Order Removing Restrictions and the Order Transferring Inherited Interests.

On August 24, 1951 (R. 196), the Portland Office of the Bureau of Indian Affairs transmitted to the office of the Bureau in Washington, D.C., a copy of the Order Transferring Inherited Interests to Appellant Siniscal (Ex. 5, R. 163), a copy of the Order Removing Restrictions (Ex. 4, R. 181), and a copy of the Warranty Deed from Appellant Siniscal to Appellees Taylors (Ex. 3, R. 436), together with a request dated August 17, 1951, that a patent be issued to Appellees Taylors (Exs. 23-A and 23-B). The concluding paragraph of this application reads, as follows:

> "It has been reported to the undersigned that the documents above-described are sufficient to establish in the undersigned a fee simple title in said lands; however, title insurance companies of the State of Oregon are disinclined to issue Certificates of Title, insuring title on lands to which no patent has even been issued."

Immediately after the payment of the $135,000.00 to the Treasurer of the United States, a part of the money was turned over to Jasper Grant and Harold F. Thornton, and the balance was deposited with the Portland Trust & Savings Bank as Conservator for the Indians (R. 554 & 572).

On issues framed as to fraud of the various defendants, and ultra vires acts by officials of the Bureau of Indian Affairs, the case went to trial, and the Court made Findings of Fact. The only Findings as to specific acts of fraud were that Appellant Siniscal misrepresented her financial worth (Fdg. VI., R. 57), and information was withheld from the Bureau of Indian Affairs that Appellant Siniscal planned to re-sell the land to Appellees Taylors (Fdg. VII., R. 58). The Court held that the $135,000.00 paid for the land was inadequate (Fdg. VIII., R. 58), and formulated the Conclusion of Law (Concl. III., R. 69) that the acts of E. Morgan Pryse in executing the documents in question, that is, the Order Transferring Inherited Interests and the Order Removing Restrictions (Exs. 5 & 4) were ultra vires.

The Court found that good cause existed for return to Appellees Taylors of the money they had paid to the Treasurer of the United States, the same to be made up of the money in possession of the Portland Trust Savings Bank belonging to the Indians, together with enough from the proceeds of a re-sale of the Indians' lands to make up the difference.

The issue before the Court tendered by Appellants is that the Court erred in rescinding the sale and cancelling the documents.

The issue before the Court as to Cross Appellant is that the Court had no power to find that good cause existed for return to Appellees Taylors of the $135,000.00 and to allow interest thereon from July 18, 1952.

BRIEF OF APPELLEES TAYLORS DIRECTED TO THE CONTENTIONS OF APPELLANTS

Argument

Appellees Taylors can take issue with Appellants in one respect only, and that is contingent.

Our only possible disagreement with the Appellants could arise if this Court affirmed the Decree of the Lower Court in respect to the Order Transferring Inherited Interests, the Order Removing Restrictions, and the Deed from Appellant Ernestine C. Siniscal to the Appellees Taylors, and yet reserved for consideration the possibility of ruling adversely to the Lower Court as to the Escrow Agreement.

Obviously, if the Order Transferring Inherited Interests, the Order Removing Restrictions and the Deed are set aside, then the condition under which the Appellants are to be paid the $25,000.00 fails. This assertion is based upon the condition of the Escrow Agreement (Ex. 2-A, R. 434) which provides that the $25,000.00 payable under the Escrow Agreement to Appellant Siniscal (R. 434) shall be paid at such time as the attorneys for the Appellees Taylors shall render an opinion that "a merchantable title is vested in Henry B. Taylor and Elizabeth A. Taylor" to the property in question.

Manifestly, an opinion that the Appellees Taylors have a merchantable title cannot be given if the muniments of title upon which the same must be based have been declared void.

The Court's Decree in this respect declares a result that was but the corollary to the other parts of the Decree. If the Deed is declared void, then there could be no merchantable title in the Appellees Taylors, for they would have no title at all.

If, therefore, it is the contention of Counsel for Appellants that the Lower Court's Decree should be reversed in regard to the Escrow Agreement, although the remainder of the Decree may stand affirmed, then we are in disagreement with the Appellants only in that regard.

In respect to the principal contention of Appellants, which is that there was no showing of fraud, or, in any event, not a sufficient showing to set aside the transaction, we recognize that one of the essential elements of fraud is that the party who claims to have been injured did in fact rely on the fraud or misrepresentation. It is obvious that the Government did not rely on the representations of Appellant Ernestine C. Siniscal as to her financial status in her Application to Remove Restrictions. She showed a net worth of only $20,000.00, and yet she was purchasing property for $135,000.00.

The Bureau of Indian Affairs certainly was not mislead as to the interest Appellees Taylors had in the transaction, for the check for $135,000.00 shows on its face that it was purchased by "Ben Taylor" (Appellee Henry B. Taylor). This was also brought to the Indian Bureau's attention through the official receipt (Ex. 73) which it issued.

As to the contentions that the acts were ultra vires, E. Morgan Pryse, the Area Director, and Francis

E. LaFrance, an employee of the Bureau of Indian Affairs, both cited the statutes and the rules and regulations, under which they acted, in preparing and executing the documents.

Except as heretofore indicated, we submit that Appellants' contentions should be sustained.

Respectfully submitted,

WILBER HENDERSON,
Counsel for Appellees
Henry B. Taylor and
Elizabeth A. Taylor.

BRIEF OF APPELLEES TAYLORS DIRECTED TO CONTENTIONS OF CROSS APPELLANT UNITED STATES OF AMERICA, AS TRUSTEE AND GUARDIAN AND EX REL. OF THE ESTATES AND PERSONS OF JASPER GRANT AND HAROLD F. THORNTON

SUMMARY OF ARGUMENT AS TO 1, 2, AND 3, SPECIFICATIONS OF ERROR BY CROSS APPELLANT

A Court of Equity, in the exercise of its power, is not circumscribed by any fast or technical rules, and, therefore, when the Lower Court decided (Fdg. XII, R. 59 & Concl. IX, R. 62) that a good cause exists for the return to Appellees Henry B. and Elizabeth A. Taylor of the sum of $135,000.00 which they had paid to the Treasurer of the United States, the Court was acting within the scope of the discretion with which it is clothed. Findings of Fact shall not be set aside unless clearly erroneous (Federal Rules of Civil Procedure 52(a)). The record in this case reveals nothing as to the conduct of Appellees Henry B. and Elizabeth A. Taylor inconsistent with the Court's Finding and Conclusion that a good cause does exist for return of the money. The Court was conforming strictly with the rule of the Supreme Court of the United States and the Federal Courts, and was especially within the Court's ruling in the case of *Heckman v. United States*, 224 U. S. 413 (cited by Counsel for Cross Appellant in support of their contentions) in directing that Appellees Taylors be reimbursed, *not from the Treasury of the United States*, but from the amount of money they had paid for the land from (a) the money in possession of the Portland Trust & Savings Bank as Con-

servator of Jasper Grant and Harold F. Thornton remaining from the original amount paid by Appellees Taylors, and (b) the balance from the proceeds of the re-sale of the lands in question.

ARGUMENT

The United States of America, as Trustee and Guardian and Ex Rel. of the States and Persons of Jasper Grant and Harold F. Thornton, by this suit invoked the equity powers of the District Court to rescind a transaction, the final incident of which was the execution and delivery of a Deed conveying 800 acres of land in Curry County, Oregon to the Appellees Taylors. Cross Appellant The United States of America, by the prayer of its Complaint (R. 11) asked that certain documents be decreed null and void, or that they be set aside and the beneficial ownership of the lands in question be restored to the Indians "upon such terms as the Court may deem equitable."

Fraud is laid as the basis for the rescission, and it also is alleged that the acts of the Area Director in executing the documents in question were ultra vires. No claim is made that any one fraudulently deceived or made any misrepresentations of fact, or mislead *either of the alleged wards,* that is, Jasper Grant and Harold F. Thornton. The Findings of the Court suggest constructive fraud only, and that, apparently, was inferred by the Court from acts of the officials of the Bureau of Indian Affairs in executing the documents in question.

The Court by Decree (R.66-69) restored the status quo of the title to the property as of before the vari-

ous documents and the Deed were given, and in the exercise of the discretion with which a Court of Equity is endowed found that a good cause existed therefor (R. 59 & 62), and directed (R. 63 & 68) that the money remaining in the possession of the Portland Trust & Savings Bank as Conservator of Jasper Grant and Harold F. Thornton, which they had received for the land, should be turned over to the Appellees Taylors. It was further ordered that this amount be supplemented by proceeds from the resale of the land in an amount sufficient to make up the full amount of the $135,000.00 (R. 68 & 69).

The Decree makes no provision for the payment of any sum of money whatsoever *by the United States of America* (R. 66-69). Cross Appellant challenges the right of the District Court to make provision for return of the money. It heretofore was pointed out that Cross Appellant, by the prayer of its Complaint, had asked relief *upon such terms as the Court might deem equitable*, and in the exercise of the discretion with which the Court was clothed, it found as a fact (Fdg. XIII., R. 59), as follows:

> "Good cause exists for the return to Henry B. Taylor and Elizabeth A. Taylor the sum of $135,000.00 turned over by them to the Area Director of the Bureau of Indian Affairs for the account of Harold Thornton and Jasper Grant."

The Court, applying equitable principles to the facts, formulated a Conclusion of Law (Concl. IX., R. 62), as follows:

> "Good cause exists for the return to Henry B. Taylor and Elizabeth A. Taylor the sum of

> $135,000.00 together with interest at the rate of 6% per annum from July 18, 1952, turned over by them to the Area Director of the Bureau of Indian Affairs for the account of Harold Thornton and Jasper Grant."

It is asserted by Counsel for Cross Appellant that the Finding (Fdg. XII., R. 59) is not a true Finding of Fact, but is a conclusion of facts. Obviously, it is the summation of all the facts which came to the Court's attention during the trial, and which the Court felt constituted good cause for the return of the money. "Good cause" as a fact belongs in the same category with "fraud," "negligence," and other legal terms that really are the summary of various independent facts.

SCOPE OF EQUITY POWER

An Equity Court, to make a finding that good cause exists for any particular reason, is no more circumscribed in its power than it is to conclude that a particular transaction was or is "fraudulent." The power, authority and right to decide either as to "good cause" or as to "fraud" finds its source in the same general power of a Court of Equity. Either one of such findings does not nullify, necessarily, the other. It readily is conceivable that a Court might make a finding of fraud to support a decree of rescission if it could palliate the consequences thereof, where otherwise, it might be constrained to withhold such finding of fraud. That is an inherent right and power of a Court of Equity.

Cross Appellant, by its contention under the Specifications of Error now being considered, would deny

a Court of Equity to which it appealed for aid the very right and power which distinguishes such Court from a Court of Law.

An excellent statement as to the scope of the discretion of a Court of Equity is found in the Opinion in the case of *Bowen v. Hockley*, 71 Fed. (2d) 781, at Page 786. We quote therefrom, as follows:

> "One of the glories of equity jurisprudence is that it is not bound by the strict rules of the common law, but can mold its decrees to do justice amid all the vicissitudes and intricacies of life. The principles upon which it proceeds are eternal; but their application in a changing world will necessarily change to meet changed situations. If relief had been granted only where precedent could be found for it, this great system would never have been developed; and, if such a narrow view of equitable powers is adopted now, the result will be the return of the rigid and unyielding system which equity jurisprudence was designed to remedy."

The Court then cited as authority in support of the foregoing *Professor Pomeroy (Equity Jurisprudence) (4th Ed.)*) Sec. 60, from which we have culled the following.

> "In fact, there is no limit to the various forms and kinds of specific remedy which he may grant, adapted to novel conditions of right and obligation, which are constantly arising from the movements of society. While it must be admitted that the broad and fruitful principles of equity have been established, and cannot be changed by any judicial action, still, it should never be forgotten that these principles, based as they are upon a Divine morality, possess an

> inherent vitality and a capacity of expansion, so as ever to meet the wants of a progressive civilization."

The foregoing are but expressions of opinion as to an Equity Court's power as universally recognized and applied.

FACTUAL BASIS FOR GOOD CAUSE

The Trial Judge, who had an opportunity to see the witnesses as they gave their testimony, was in a more advantageous position to determine whether or not a "good cause" did exist for return of the money than one who has but the written record upon which to base a conclusion. We, in this connection, will call attention to some of the more pertinent facts and circumstances.

Since the chronological sequence of the events is of itself not without significance, we will first direct attention to the fact that no claim is made by the Cross Appellant that the Appellees Taylors knew of the land in question, or anything about it whatsoever before *August 3, 1951* (R. 663 & 859). Appellees Taylors were solicited at that time by one William F. Brenner (originally one of the defendants in this suit) for assistance in the financing of the purchase of the land in Curry County (R. 663 & 859). The Trial Court, having the foregoing in mind, considered the following:

(a) The Certificate of Appraisement which formed the basis for selling the land for *$135,000.00* was made and filed with the Portland Office of the Bureau of Indian Affairs on *May 16, 1951,* (Ex. 13,

R. 144 & 145), and *long before* Appellees Taylors had any information in regard to the land, or entered upon the scene. The appraiser, Patrick L. Gray, was a Forester employed by the Land Division of the Bureau of Indian Affairs (R. 516), and there is no evidence that any one ever sought to influence him in regard to the nature of the appraisement he made.

(b) Jasper Grant and Harold F. Thornton signed and lodged with the Portland Office of the Bureau of Indian Affairs on *July 13, 1951,* their Consents (Ex. 12, R. 155, and Ex. 11, R. 157) *long before* Appellees Taylors entered into negotiations for purchase of the land. Neither Grant nor Thornton had ever met Appellees Taylors before August 7, 1951, or for that matter at any time before the time of the trial (R. 522 & 567). By these Consents (Ex. 11 & 12), the Indians agreed to sell the land for *$135,000.00,* of which each was to receive *$67,500.00.*

(c) Appellees Taylors never had any conversation whatsoever with E. Morgan Pryse, the Area Director, who executed the documents in question (R. 283), and Pryse did not know either of them.

(d) Appellees Taylors' check (Ex. 1, R. 194) for $135,000.00 was payable directly to the Treasurer of the United States, and it bore upon its face the notation, "Purchased by Ben Taylor," (Ben Taylor being Appellee Henry B. Taylor, R. 887). This eliminates any suggestion that Appellees Taylors were endeavoring to conceal their identity, or *the source of the money* paid to the United States. In this connection, Francis E. LaFrance, who handled the transaction at the Portland Office, testified (R. 186) that he was

introduced to Mr. Taylor on August 7, 1951, and *he was handed the check* (Ex. 1, R. 194) *by Mr. Taylor* for $135,000.00.

(e) The Bureau of Indian Affairs issued a receipt (Ex. 73, R. 187) showing that the check was to be held subject to approval of the documents, and, also, identifying Taylor as the purchaser of the bank draft. We quote therefrom, as follows:

> "Cashier's check No. 14-22742, drawn on Bank No. 96-331/1232 payable to Treasurer of the United States, in amount of $135,000.00. *Notation on check*: Purchased by Ben Taylor."
>
> * * *
>
> "To be held in Special Deposits account of Ernestine C. Siniscal pending the approval of Deed and recordation of Removal of Restrictions covering Public Domain Lands, allotments R-80, 82, 83, 84 and 103."

(f) Ordinarily, stealth, secrecy and concealment are concomitants of fraud, and yet the Appellees Taylors throughout the transaction were open and aboveboard in everything they did in connection with the transaction. They placed of record immediately the Order Transfering Inherited Interests (Ex. 5, R. 163), the Order Removing Restrictions (Ex. 4, R. 181), and the Warranty Deed (Ex. 3, R. 436), as is evidenced by the endorsement of recording of the County Clerk of Curry County, Oregon, appearing upon such exhibits, that is, Exhibits 3, 4 and 5.

(g) The Court also must have considered the letter from the Area Office (Ex. 14), dated August 7, 1951, to the Commissioner of Indian Affairs, Wash-

ington, D. C., transmitting to that office copies of the Order Transferring Inherited Interests and the Application for Removal of Restrictions, which read in part, as follows (R. 346):

> "Simultaneously with the approval of the order transferring inherited interest, the purchaser applied for removal of restrictions."

This demonstrated that the local office, was apprising the office at Washington of exactly what had been done.

(h) The Court also had for consideration the testimony of E. Morgan Pryse, the Area Director (R. 332, et seq.), in which he cited the law and the regulations which he considered authorized each and every act in this transaction. As to the signing of the Order Transferring Inherited Interests (Ex. 5, R. 163), see R. 332; as to the Order Removing Restrictions (Ex. 4, R. 181) see R. 333; for authority to take the Application Removing Restrictions (Ex. 9, R. 172), see R. 333; for procurement of the Consents of Sale (Ex. 11 & 12, R. 157 & 155), see R. 333, 334 and 336; as to authority for obtaining the Certificate of Appraisement (Ex. 13, R. 144), see R. 336 and 337; for authorization of the Area Office to receive money for the Indian land and the issuance of a receipt therefor (Ex. 73), see R. 338. This record discloses that the Area Director, in all of the acts done and performed and in executing the documents, was acting according to some statute or regulation.

(i) According to the testimony of E. Morgan Pryse (R. 350), two or three transactions, similar to the one in question, were being cleared through

the Portland Area Office *each week*. A legal advisor of the Portland Area Office (Ex. 26, R. 348) gave as his opinion that the "Order Removing Restrictions" as soon as issued placed the land on a taxable basis.

(j) F. E. LaFrance testified (R. 188) that his authority for preparing the Order Transferring Inherited Interests was found in Section 202.04 (C) (2) of the Indian Affairs Manual, which reads in part:

> "Heirship allotments in cases where one or more of the heirs are shown to be incompetent to manage their affairs may be conveyed in restricted title status by an 'Order Transferring Inherited Interests.' * * *"

(k) E. Morgan Pryse testified (R. 346) that his authority for issuing the Order Removing Restrictions was found in Section 201.06 of the Manual (Ex. 41).

The last three items are especially pertinent to the Finding that these acts were ultra vires. At no juncture of this case has the inapplicability of these sections been demonstrated, and the only basis for the contention of ultra vires is that Ernestine C. Siniscal, in making her application (Ex. 9, R. 172) exaggerated her financial worth (Fdg. VI., R. 57). She represented her net worth to be approximately $20,000.00 This, however, was so far short of the $135,000.00 she was making in payment for the land that it hardly could have been assumed by the Bureau of Indian Affairs that she was providing the purchase money herself. E. Morgan Pryse testified (R. 342) that he examined the application, and that he was aware of the representations she made as to her financial worth.

This is not a case where the money was paid directly to the Indians. Neither is it a case where the Appelees Taylors in any way imposed upon the Indians. As heretofore pointed out, Jasper Grant and Harold F. Thornton both testified that they had never met Appellees Taylors before August 7, 1951 (R. 552 & 567). The record shows that they had signed their Consents to sell the land (Ex. 11 & 12, R. 157 & 155) approximately one month before the Appellees Taylors entered the transaction. No evidence was offered or received that in the slightest degree tended to establish that either Appellee Henry B. Taylor or Appellee Elizabeth A. Taylor ever made any misrepresentation of fact to either of the Indians, or to any agent or officer of the Bureau of Indian Affairs. Counsel for Cross Appellant have not pointed to one iota of evidence that in any way connects either of the Appellees Taylors with any act suggesting fraud or misrepresentation.

The context of the foregoing items of evidence which we have pointed out standing alone furnish ample basis for the Court's Finding as to "good cause." If read, however, with the entire record, the significance thereof becomes more manifest. The Court could well conclude therefrom that there was good cause for returning to Appellees Taylors the money they had paid by check to the Treasurer of the United States.

EFFECT OF RULE 52(a), CIVIL PROCEDURE

We assume that it will be conceded that the burden is upon him who attacks a Finding to show that it is clearly wrong before it will be set aside. The only at-

tempt Cross Appellant has made to show that the Court's Finding of "good cause" is wrong is through argument that it is contrary to the Court's Finding of fraud. Counsel have cited no rule of law to the effect that one of the foregoing Findings necessarily contradicts the other. Neither have they cited any authority to the effect that one Finding must give way or yield in force and effect to another.

As a matter of fact, the Findings are not contradictory. The Court, apparently, concluded that the constructive fraud which it made the basis for rescission was not of such a nature or so attributable to Appellees Taylors as to justify withholding from such Appellees the money they had paid under the circumstances.

The *Federal Rules of Civil Procedure* furnish the guide as to the effect that should be given Findings. We refer to that part of *Rule 52* which prescribes its own effect. The Supreme Court of the United States, in the case of *United States v. National Association of Real Estate Boards,* 339 U. S. 485, had occasion to interpret this rule. It had under consideration an appeal from a judgement of dismissal on the charge that several defendants were engaged in a price-fixing conspiracy to violate the Sherman Act. The Trial Court's Findings, inter alia, found that two of the defendants *did not conspire* with the Washington Board to fix prices. The Court observed (Page 494):

> "No more particularized findings were made. Appellant asks us to set aside that ruling. The question is whether we may do so in light of Rule 52 of the Federal Rules of Civil Procedure, 28 U.S.C.A., which provides in part:

'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness.' "

* * *

"It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Courts apparently deemed innocent. See *United States v. Yellow Cab Co.,* 338 U.S. 338, 342, 70 S. Ct. 177, 179; *United States v. United States Gypsum Co.,* 333 U.S. 364, 394-395, 68 S. Ct. 525, 541, 92 L. Ed. 746. We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous. (Page 495):

* * *

"The judgement of the District Court is reversed except as to the National Association and Nelson; and as to them it is affirmed."

Directed to the same question, and with the same construction of Rule 52 (a), are the following cases:

Pacific Portland Cement Co. v. Food Mach. & Chem. Co., 178 Fed. (2d) 451 (Ninth Circuit);

*Remington Rand, Inc. v. Society Interna*tionale, 188 Fed. (2d) 1011;

Barry v. Lawrence Warehouse Company, 190 Fed. (2d) 433 (Ninth Circuit);

J. P. (Bum) Gibbons, Inc. v. Utah Home Fire Insurance Co., 202 Fed. (2d) 473.

The Court having made the Finding that a good cause exists, and Counsel for Cross Appellant having failed to show that the Finding is *clearly wrong,* it is submitted that the same must be sustained.

HECKMAN CASE

Counsel for Cross Appellant contend that under the ruling of the Supreme Court in the case of *Heckman v. United States,* supra, and the cases based thereon, that the Court, having rescinded the sale or transaction, was without power or authority to return the money. It is our contention that there is nothing in the *Heckman Case* to compel any such conclusion, but rather the very reverse.

The Heckman Case was before the Supreme Court on appeal from a Decree of the Circuit Court of Appeals' reversing an Order sustaining a Demurrer to a Complaint. In other words, the Court had for consideration only the sufficiency of the allegations of the Complaint. It was alleged that various persons obtained deeds or conveyances from members of the Cherokee Nation at a time when such lands were subject to a restriction on the power of alienation. In that case, the various Indians had given deeds or conveyances, and the suit was for the purpose of setting the same aside on the grounds that the Indians were without authority to convey. The actual title was vested in the Indians, but the right of alienation was subject to certain restrictions. In the instant case, the Indians held an inherited interest in "Trust Patents," and the documents, the subject of the suit, were executed by officials of the Bureau of Indian Affairs and *not by the Indians* themselves. The only

document executed by the Indians were the Consents (Exs. 11 & 12, R. 157 & 155), and they were not procured by any of the parties defendant. The Cross Appellant did not ask that the "Consents" be set aside. The Consents had been prepared and were signed in the office of the Bureau of Indian Affairs (R. 152). The foregoing may not have too much to do with the legal question involved, but in the interest of accuracy, we call it to the Court's attention.

The part of the *Heckman* appeal pertinent to this cause begins on Page 446 of Volume 224 of U. S. Reports, and for convenience and ready reference, the same is herein set out, as follows:

> "It is said that the allottees have received the consideration, and should be made parties in order that equitable restoration may be enforced. Where, however, conveyance has been made in violation of the restrictions, it is plain that the return of the consideration cannot be regarded as an essential prerequisite to a decree of cancelation. Otherwise, if the Indian grantor had squandered the money, he would lose the land which Congress intended he should hold, and the very incompetence and thriftlessness which were the occasion of the measures for his protection would render them of no avail. The effectiveness of the acts of Congress is not thus to be destroyed. The restrictions were set forth in public laws, and were matters of general knowledge. Those who dealt with the Indians contrary to these provisions are not entitled to insist that they should keep the land if the purchase price is not repaid, and thus frustrate the policy of the statute. *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160, 170, 171, 34 L. ed. 640, 644, 11 Sup. Ct. Rep. 57.

"But it is suggested that there may be instances where the consideration could be restored without interfering with the policy which prohibited the transfer; that is, without in any way impairing the right to the recovery of the land or the assurance to the Indian of his possession free from encumbrance. It is said, for example, that there may have been an exchange of lands, and that the Indian grantor should not, on retaking the restricted lands, be permitted at the same time to retain those which he has received from the grantee. Or there may be other property held by the Indian grantor free from restrictions, so that restoration of the consideration may be enforced without working a deprivation of the restricted lands, contrary to the act of Congress. We need not attempt to surmise what cases of this sort may arise. It is sufficient to say that no such case is here presented. *It is not presented by the mere allegation of the bill that the conveyances assailed purport to have been made for pecuniary consideration. It will be competent for the court, on a proper showing as to any of the transactions that provision can be made for a return of the consideration, consistently with the cancelation of the conveyances and with securing to the allottees the possession of the restricted lands in accordance with the statute, to provide for bringing in as a party to the suit any person whose presence for that purpose is found to be necessary.*" (Emphasis ours)

In the instant case, the "pecuniary consideration" is the very thing in regard to which Cross Appellant has brought this case to this Court. Jasper Grant and Harold F. Thornton are before the Court, so we have in this case the very situation which the

Court must have had in mind when it wrote the foregoing, viz., (Page 447):

> "It is not presented by the mere allegations of the bill that the conveyances assailed purport to have been made for pecuniary consideration. It will be competent for the court, on a proper showing as to any of the transactions that provision can be made for a return of the consideration, consistently with the cancelation of the conveyances and with securing to the allottees the possession of the restricted lands in accordance with the statute, to provide for bringing in as a party to the suit any person whose presence for that purpose is found to be necessary."

Both Jasper Grant and Harold F. Thornton were called as witnesses by the Cross Appellant, and gave testimony (R. 549, et seq. and R. 566, et seq.) to the effect that, among other things, they received $67,500.00 each, and that some part of the money was then on deposit with the Portland Trust & Savings Bank. The parties were before the Court, and the pecuniary consideration was in issue, which are precisely the things referred to in the *Heckman Case* as the basis for return of the consideration. It seems to us that there could not be a case falling more clearly within the last quoted language of the *Heckman Case* than the one now before the Court. If it is not applicable here, it has no meaning at all, for in this case the conditions are present that are laid down in the *Heckman Case* as prerequisite for the relief given.

Counsel for Cross Appellant also cite the case of *Hall v. United States*, 201 Fed. (2d) 886, but the

Court in that case, in effect, confirmed what we have just said relative to the *Heckman Case,* and in support thereof, we quote from Page 887, as follows:

> "The subsidiary question presented is that the court should have in any event required restoration of the consideration paid by the appellant to the restricted Indian for the void lease. No request was made that the allottee, Jane Robinson, be made a party to the action for this purpose. See *Heckman v. U. S.,* 224 U.S. 413."

That language can mean only that if Jane Robinson had been made a party, the request for return of the consideration would have received proper attention by the Court.

Counsel for Cross Appellant cite, also the cases of *United States v. Rickert*, 188 U.S. 432, *Minnesota v. United States,* 305 U.S. 382, *United States v. Trinidad Coal & Coking Co.,* 137 U.S. 160, *United States v. Gilbertson,* 111 Fed. (2d) 978, *Causey v. United States,* 240 U.S. 399 and *Pan-American Petroleum Co. v. United States,* 273 U.S. 456, in regard to which we suggest that the true function of a precedent is to illustrate a principle. Such principle, however, to be applicable, must in some measure deal with a comparable factual situation. A reading of the six cases just referred to will disclose readily that they are not precedents for the question now before the Court. We have here as the basis for the Court's action *a Finding that a good cause does exist for the return of the consideration.*

CONCLUSION AS TO 1, 2, AND 3, SPECIFICATIONS OF ERROR OF CROSS APPELLANT

I. A Court of Equity is not circumscribed by fast and technical rules as to how it should exercise its discretion.

II. Findings of Fact by a Court of Equity are not to be set aside unless shown to be clearly erroneous.

III. The record supports the Court's Findings that a "good cause" does exist for return of the consideration.

IV. *Heckman v. United States,* supra, is authority for the proposition that where in an Indian land case the pecuniary consideration is an issue, and the parties who received the consideration are before the Court, it may consider and pass upon whether or not the consideration shall be returned.

We respectfully submit that the Court, in requiring that the money in the hands of the Portland Trust & Savings Bank should be returned to Appellees Taylors, acted within its authority, and that it also acted within the scope of its authority in directing that the land in question be re-sold, and that from the proceeds thereof a sufficient amount to make up the $135,000, after applying the money received from the Portland Trust & Savings Bank, should be paid to the Appellees Taylors.

AS TO CROSS APPELLANT'S 4TH SPECIFICATION OF ERROR

Counsel for Cross Appellant assert that the Court erred in ordering the payment of interest on the money which it decreed should be repaid to the Appellees Taylors. What we heretofore have said in respect to Specifications of Error, 1, 2 and 3 applies with equal force to this alleged Specification of Error.

Appellees Taylors, on August 7, 1951, paid to the Treasurer of the United States the sum of $135,-000.00. The Decree directs payment of interest only from July 18, 1952, that is, the interest is not to begin accruing until approximately one year after the money was paid.

It appears from the record (R. 554 & 572) that some time immediately after the money was paid to the Bureau of Indian Affairs a substantial part of it was delivered to the Portland Trust and Savings Bank as Conservator for Jasper Grant and Harold F. Thornton. Since under the general rule applicable to guardians, the guardian is charged with the duty of keeping the ward's funds invested, it is but fair to assume that a substantial part of the money received by the Portland Trust and Savings Bank *has been drawing interest.*

The amount of interest payable under the Decree would have been negligible had the Decree been carried out, for under the regulations of the Bureau of Indian Affairs, a sale by public bid may be made after the same has been advertised for thirty days

(Regulation 202.04 D (e), Indian Affairs Manual, Ex. 41). The Appellants posted no supersedeas bond, and, therefore, there was no hindrance to a sale, and it could have been effected in the early part of September, 1952. The Court imposed no delay by anything provided-for in the Decree, as suggested by Counsel for Cross Appellant on Page 24, of its Brief.

Counsel for Cross Appellant submitted as a legal basis for their argument under this Specification of Error the decision of the Court in the case of *United States v. Sherman,* 98 U.S. 565. We can find nothing in that case at variance with the Court's Decree. The *Sherman Case* was one in which the Relator, one Alexander McLoud, asked for a Writ of Mandamus to compel John Sherman, Treasurer of the United States, to pay interest on a judgment obtained against one T. C. Callicot. Callicot was an agent of the Treasury Department, and the United States became liable to pay the judgment *only on issuance of a Certificate of Probable Cause.* The Certificate was issued, and McLoud received $12,039.50 on the judgment, which was originally for $11,700.68. The interest sought by the Relator was interest *that had accrued before the issuance of the Certificate of Probable Cause,* and the Court very properly held that there was nothing in the statute authorizing interest before that date. The *Sherman Case* in no way bears upon the subject of limiting the discretion of a Court of Equity.

Counsel for Cross Appellant suggest that although the money is not to be paid by the Government, nevertheless, because the Indians are wards of the

Government, the rule as to the immunity of the sovereign against the payment of interest applies. This claim is not tenable, as was demonstrated in the case of *Miller v. Robertson,* 266 U. S. 243 wherein the Treasurer of the United States, the Alien Property Custodian and Aliens were defendants. The Court in that case pointed out that the essential condition as to sovereign immunity was that the claim be against the sovereign itself, that is, against the United States.

The Court held in the case just referred to *(Miller v. Robertson)* that a Court of Equity will not disturb a Finding as to interest unless it is apparent that there has been a clear abuse of discretion.

To the same effect are the cases of *Anderson Meyers Co. v. Fur & Wool Trading Co.,* 14 Fed. (2d) 586 (Ninth Circuit), *In Re: Paramount Publishing Corporation,* 85 Fed. (2d) 42, and *Giurlami & Brother v. Commissioner of Internal Revenue,* 119 Fed. (2d) 852.

We respectfully submit that the Court's award of interest in this case is clearly within its discretion, and since Counsel for Cross Appellant have not shown that there was a clear abuse of discretion, the Conclusion of Law of the Lower Court as to interest should be sustained.

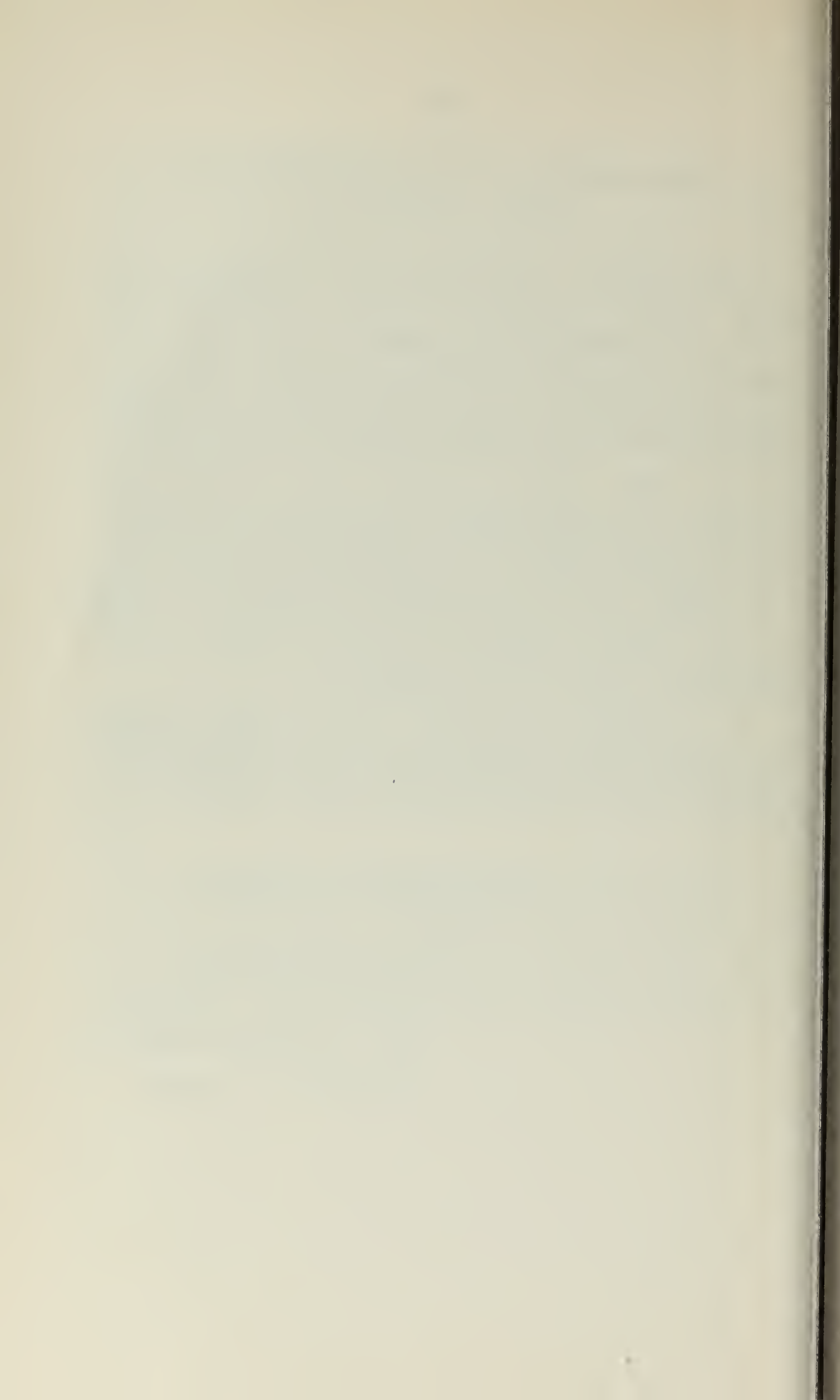
CONCLUSION AS TO CONTENTIONS OF CROSS APPELLANT

It is submitted that Counsel for Cross Appellant have failed completely to show that the Lower Court's Finding of good cause for return of the money to Appellees Taylors is clearly erroneous. The Lower Court's Decree directing that the $135,-000.00, which was received by the Treasurer of the United States and then turned over to Grant and Thornton, be reimbursed to the Appellees Taylors from the amount thereof remaining in possession of the Portland Trust and Savings Bank and the balance made up from a re-sale of the lands, is based upon a Finding made by a Court of Equity acting within the scope of its authority.

It is submitted that the Lower Court's Decree as to return of the principal sum of $135,000.00 with interest thereon from July 18, 1952, should be affirmed.

Respectfully submitted,

WILBER HENDERSON,
Counsel for Appellees
Henry B. Taylor and
Elizabeth A. Taylor.



No. 13681

In the United States Court of Appeals for the Ninth Circuit

ERNESTINE C. SINISCAL AND ELMER A. REED, APPELLANTS

v.

UNITED STATES OF AMERICA, AS TRUSTEE AND GUARDIAN AND EX REL. OF THE ESTATES AND PERSONS OF JASPER GRANT AND HAROLD F. THORNTON; HENRY B. TAYLOR AND ELIZABETH A. TAYLOR, HUSBAND AND WIFE; WILLIAM F. BRENNER AND FRED M. MARSH, APPELLEES

UNITED STATES OF AMERICA, AS TRUSTEE AND GUARDIAN AND EX REL. OF THE ESTATE AND PERSONS OF JASPER GRANT AND HAROLD F. THORNTON, APPELLANT

v.

ERNESTINE C. SINISCAL, ELMER A. REED, HENRY B. TAYLOR AND ELIZABETH A. TAYLOR, HUSBAND AND WIFE, AND S. D. ALEXANDER, APPELLEES

UPON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES, APPELLEE

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FILED
[illegible] 1953

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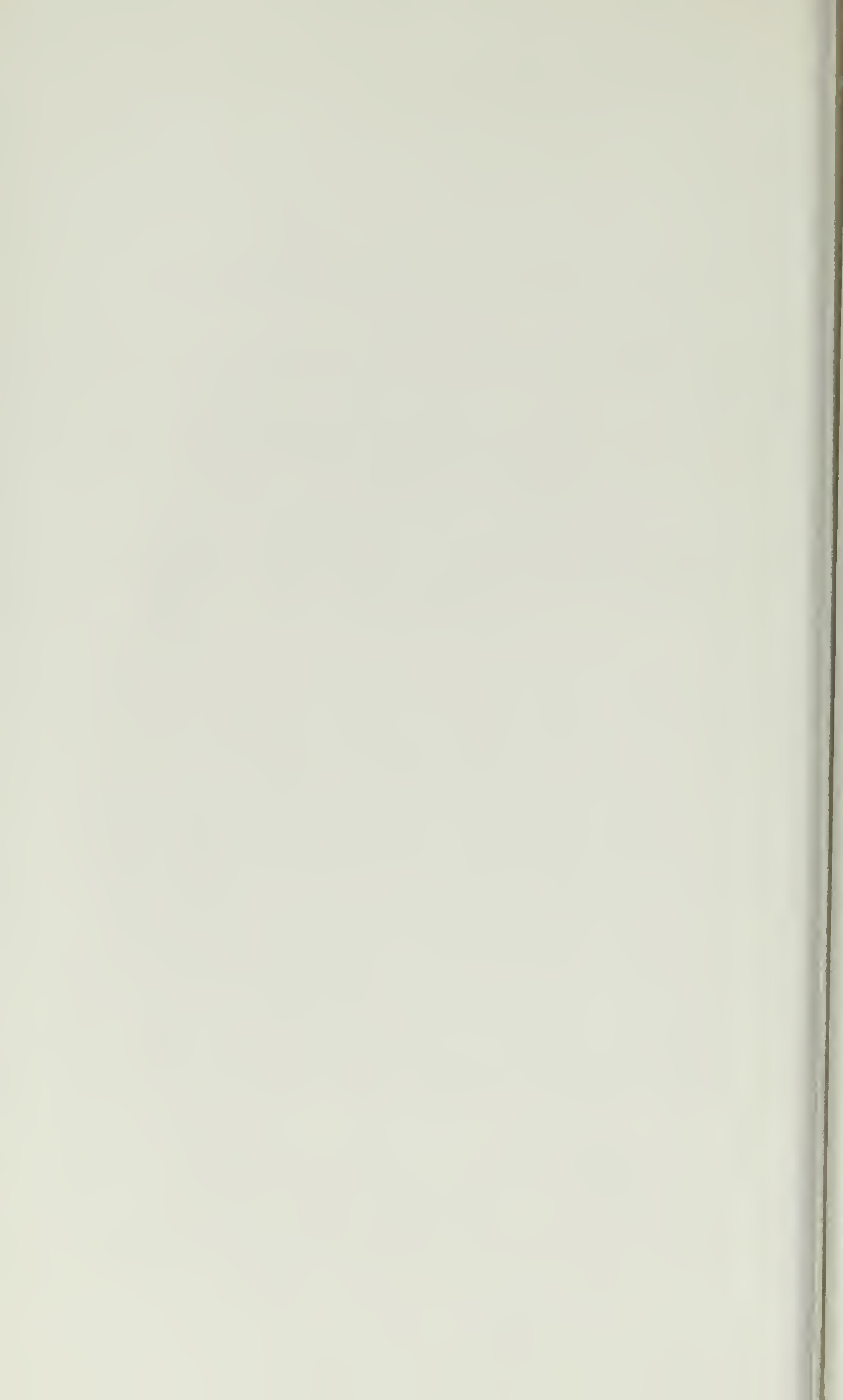

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UPON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The district court did not write an opinion. The findings of fact and conclusions of law appear at R. 55-63.[1]

[1] At R. 20-27 are certain facts agreed to by all parties with the exception of appellants Reed and Siniscal, plus other facts agreed to by the Government and Alexander, intervenor below. When the court made its ultimate findings and conclusions after trial, it expressly found as true all such facts contained in the Pretrial Order except that it made a minor amendment in one of them (R. 55-56).

JURISDICTION

The jurisdiction of the district court and of this court is set forth at page 2 of the Government's opening brief as cross-appellant.

QUESTIONS PRESENTED

1. Whether, where federal law provides that property held under trust patents may be sold to another Indian at a value to be administratively determined, but requires public bidding if sold to a non-Indian, and a non-Indian uses an Indian to take title as a purported purchaser, having in advance taken a deed from the supposed purchaser, the non-Indian paying for the land and placing $25,000.00 in escrow for the supposed Indian purchaser for her services, the trial court erred in concluding under all the circumstances of the case that the transaction is fraudulent and in adjudging that the instruments purporting to place title in the non-Indian are void.

2. Whether the court erred in concluding that the Area Director, in signing an Order Transferring Inherited Interests and an Order Removing Restrictions, essential elements in this transaction, exceeded his authority, and in adjudging the entire transaction void.

STATEMENT

The nature of this case, an analysis of the pleadings, the court's findings, conclusions, and judgment, are fully set out at pp. 3-10 in the Government's brief as cross-appellant hereinbefore filed, and need not be here repeated. In that brief, however, since the questions raised by the Government on its appeal turn upon the findings as made by the court below, no analysis of the evidence was necessary. At pages 2-6 of the brief of

appellants Siniscal and Reed is a purported statement of the case which is entirely devoid of record references. In this situation, the Government proceeds to give this Court a chronological, documented resume of the testimonial record in this case. This case logically divides into two phases.

1. *The Alexander-Reed Project—May to July 13, 1951:*—Appellants correctly state (Br. 3) that the transaction the subject of this suit was initiated in May, 1951, when Alexander contacted Reed, an Indian, about the possibility of purchasing the land in suit, and that they visited the Indian Bureau at Portland in that connection and dealt with La France and Flinn.[2] Reed had had previous dealings with Alexander (R. 937). Asked what was the deal between him and Alexander, Reed testified that "I was to purchase it and turn it over to him at a profit to myself of $12,500.00," but he did not tell La France about the deal (R. 937-938).[3]

Then occurred one of the bizzarre features of this case. La France testified that Mr. Patrick Gray, a former forester in the Portland Office, was acquainted with the facts and made an appraisal of the timber on the land (R. 140). La France was one of those who

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[2] Flinn was the Realty Officer at the Indian Agency (Fdg. I, R. 56) and La France was a Land Field Agent under Flinn, from whom he received his orders and instructions (R. 134-135).

[3] Reed is no simple-minded Indian, as he had been an official of the Siletz Tribal Council "off and on for about 10 years" (R. 930). Reed had also been an intimate of Dr. Roe Cloud, deceased at the time of trial (Appellant Siniscal's Deposition, R. 783), where she explained that it wasn't necessary for anybody to explain to her the procedure for purchasing Grant's land because "He [Dr. Roe Cloud] had discussed it several times at my home in Cutler City * * *. There were many such discussions" between Reed and Cloud going back as far as 6 or 8 years (R. 783-784). And Dr. Roe Cloud was the Area Realty Officer at the Swann Island Indian Office in Portland, the position to which Flinn succeeded upon Cloud's death, in February, 1950 (R. 133-134).

talked to Gray about making the appraisal. He asked him what "he thought the appraisement would be" and that "that is what he fixed up" (R. 141). Gray's appraisal was quickly forthcoming (Ex. 13 (R. 144-146) dated May 16, 1951), and is quite revealing. It recites "that on the [ ] day of [ ], 19 , I personally visited and made a careful inspection of the following described lands (describing the lands of Grant and Thornton)," and estimated the timber at 24,000,000 feet at $5.50 per thousand, or $133,000.00. The land, as distinct from the timber, was valued by La France at $2400 (R. 145, 746), which brought the total to $135,000.00. The appraisal recited that it was based upon a cruise by another, Marion Wilkes, in 1925, which was twenty-six years previous (R. 146).

Gray testified at the trial (R. 516-532). His testimony may be thus summarized: He was not the appraiser for the Lands Division of the Indian Office, but was employed by the Forestry Division of the Indian Office. The appraisal was based on what knowledge he had of log values, sales, etc. (R. 518), but he had no knowledge of any comparable sales in the vicinity at that time (R. 519), he did not know there were any lumber mills in Gold Beach, where the property is located (R. 527-528), and his appraisal was on the theory that the timber would have to be hauled to Coquille, Oregon, at a cost of $16.00 per thousand feet (R. 520). His file contained no information of comparative sales in 1951. Moreover, Gray had not been on the property since 1946, or perhaps 1944, when he "went through there." He had not been on it more than once, but had passed "pretty close to it" (R. 517).[4] Regarding his regular

[4] That the appraisal was otherwise illegal is shown by 25 C.F.R. section 241.24 which governs "Appraisement of lands for sale". This

duties, Gray testified he had to do with fire protection, he "assisted in appraising timber lands and timber", "inspected" timber sales, compiled statistical records, checked scales, and did "any job that came along", that he seldom was called upon to look at or sign appraisal certificates and that the one in this case was the only one he had signed in the twelve months preceding May, 1951 (R. 528). He testified also that his appraisal took perhaps a half an hour or an hour, that he "made some pencil notes and figured it out from there", and that when he had been on the property in 1946 he did not cruise it—"I walked through some of it" (R. 530).

La France testified it was the first appraisal made in that manner and that it was "unusual" (R. 246). La France also testified that the regular appraiser was Mr. Hague, but he was then busy elsewhere (R. 759). The trial court elicited from La France that there was no urgency about making the appraisal, and that he took no steps to have others check the appraisal (R. 759-760).

On June 22, 1951, Reed and Alexander, obviously having been advised of the appraisal at $135,000.00, reduced their agreement to writing. This agreement, not printed in the record, was attached as an exhibit to Alexander's complaint in intervention and is Pre-trial Exhibit No. 34 (Fdg. X, R. 59). It provided that

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requires that "the superintendent or other officer in charge shall *visit*, *view*, and appraise it at its full value." (Italics supplied.) It contains the further provision that no land could be sold unless an appraisement had been made within 6 months of the sale. The obvious intent here is to bar appraisements based on viewing the property more than six months before sale. The possibility that an appraiser can accurately gauge present timber footage on another's cruise, even though it is twenty-six years old, is at best dubious. But, conceding that, it is irrelevant since the regulation provides otherwise and Gray's appraisement violated it, since he never left his office when he made the appraisement.

Alexander was to have until August 21 to cruise the timber on the lands here in question, and he would elect whether to purchase the property for $147,500.00. That if he so advised Reed before August 21, 1951, Reed would take steps to obtain the title, that Alexander would pay to the Indian office $135,000.00 and give Reed $12,500.00 upon delivery by Reed of a good and sufficient warranty deed.

On July 13, 1951, Alexander and Reed, accompanied by Grant and Thornton, visited the Indian office again.[5] At that time Flinn had ruled the transaction out and Reed and Alexander were informed that the contemplated sale to Reed would not be made. The reason given by La France was that it was known to them by that time that the real purchaser was Alexander (R. 151) and that "we couldn't have sold to Alexander without a competitive bid" (R. 758). Reed testified that La France and Flinn told him "They didn't want to risk having any trouble in the case" (R. 939).

Notwithstanding the fact that the proposed sale was off, consents to sell the property for $135,000.00 were procured by La France from Grant and Thornton at that time. (Exhibits 11 and 12, R. 155-157.) This circumstance prompted the court below to ask La France why it was done, and La France answered (R. 154) that "They were taken only for our records, *and*

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[5] La France testified he had informed Reed on his first visit in May that consent of the two Indians was necessary (R. 146). Reed undertook to reach the Indians and ran into some difficulty. He found Grant on June 18 or 19, at Gold Beach, when he was in no condition to talk. Reed took him up the river 18 miles, kept him there all day until he sobered up, then explained the purchase to him, and he agreed to go to the Indian Agency (Deposition of Reed, R. 933-934). He did not reach Thornton until July 11, when he found him in jail in Crescent City, California, in a bad mood (R. 935-936).

in the event in the future a purchaser could be found in the future" (italics supplied).

While Alexander's dream was blasted, his scheme lived on, because practically coincident with Flinn's refusal to deal with Alexander, and even before that, a new cast of characters came upon the stage, and succeeded where Alexander had failed. The case from this point on is remarkable in this respect, that whereas the good faith of Alexander and Reed had been suspected and finally denounced by La France and Flinn, no obstacle was interposed in the path of those who took over, even though Reed was shown to be connected with it.

2. *The Blanford-Marsh-Brenner-Taylor Project—July to August 7, 1951:*—The second phase of this case opened with the entry upon the scene of John C. Blanford, a defendant in the court below. Appellant Reed testified that Blanford came to him at his home in Cutler City "sometime in July" and said he "wanted to make a deal" on the Grant and Thornton allotments and that Reed declined. Blanford came to him twice, Reed fixing the dates as July 1 and July 13 or 15 (R. 948-949).[6] Reed further testified that when, on the

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[6] The Government was unable to prove directly how Blanford became aware of the possibilities respecting the allotments. Of the four persons who had been dealing previously, it can certainly be said that Alexander did not inform him. Reed claimed not to have met Blanford previously (R. 948). However, La France had met Blanford three or four times and defendant Marsh about three times previous to this transaction, but he denied that either Marsh, Blanford or Brenner, defendants below, had ever made any inquiry of him regarding the property (R. 749). Blanford was no stranger to Flinn, however. Flinn brought Blanford to the office of E. Morgan Pryse, the Area Director at the Indian Office, several years prior to this transaction and recommended him for employment by the Indian Office (R. 353). No information could be elicited from either Blanford or Flinn, since they, as well as Marsh, declined to testify on pleas of self-incrimination when called as Government witnesses (R. 497-515).

latter occasion, Blanford made this proposal Reed asked him "if Marsh and he were working together" and Blanford told him they were. This showed that Reed already knew that Marsh was then engaged in an endeavor to procure the property and that Reed expected to be contacted in that connection (R. 948-949).[7] Reed declined Blanford's invitation, telling him "nothing doing because I had a contract with Alexander for the property" (R. 951). This was on July 13 or 15, their second meeting, when Reed knew the Alexander deal was dead. He suggested his daughter, appellant Siniscal, might "make the deal for him", gave her address to Blanford (R. 951) and on July 17, 1951, talked with his daughter about going in on this deal for $25,000.00. He told her his deal with Alexander fell through and that if she "can go and buy it and make any money with it, go ahead and I will give you all the advice I can" (R. 952-953).

Siniscal testified that, after her father discussed the matter with her, Blanford called her on the telephone, telling her he wanted to discuss the matter he had talked to Reed about, and she agreed to see him at her home. He told her "it was all fixed at the Swann Island Area office so he could get the Grant allotment for his buyer. He said that because of my Indian blood I would be able to have the title transfered to me and when I passed title to his buyer I would have a profit of $25,000.00" (R. 787).[8]

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[7] Reed's attempt to remedy this by testifying the name Marsh just came to him "out of a clear blue sky" (Reed's pretrial deposition, R. 950) is fantastic. When at the trial Reed testified he had not previously known Marsh, the court below warned him "to tell the truth" (R. 465).

[8] This quotation is from a statement Siniscal had given prior to her deposition to a Government agent named Hoppenjans. It was being read by her during her deposition because she claimed it was

Appellant Siniscal in her deposition referred to "my commission" of $25,000.00 and stated that she well knew what she had to do "to earn it". She was "to have the title transferred to me from the Indians, Grant and Thornton, and I was to sell it to this person Mr. Blanford contacted". She got this information from Blanford through a conversation in "the last two weeks of July". She further deposed that "It wasn't necessary for anybody to explain it [the procedure] to me because I have been acquainted with Dr. Roe Cloud, now deceased, and it was quite clear to me", citing numerous discussions she had heard between Cloud and her father (R. 782-783).

Having arranged for the services of Mrs. Siniscal, as an Indian, to "get the Grant allotment for his buyer", it developed that Blanford and Marsh also needed someone to put up the money. To this end Blanford called upon William A. Brenner, a building contractor, at his home in The Dalles, Oregon.[9] Brenner fixed the time as in July and "about a week before I went up there and talked to Mr. Taylor". [It is unquestioned in the record or by appellants that the first Taylor contact was on August 3, 1951, Fdg. 5, R. 25.] Blanford told him there were 800 acres and gave him

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wrong in some respects. She did not, however, deny the above-quoted statements. The statement (in her deposition (R. 788)) that she thinks she has "already disputed that statement" refers to a statement that she did not understand what she was to do to earn the $25,000.00, which she had repudiated at R. 782-783.

[9] Brenner was married to a niece of Flinn. He built a house for Flinn for $10,000.00 and extras Flinn ordered raised this to $13.-000.00. Flinn was to get a bank loan to pay Brenner. Although the house was 80% complete when this litigation started, Brenner did not receive anything from Flinn until about the time a reporter for the *Oregonian*, a Portland newspaper, contacted him about the Grant-Thornton sale, when Flinn procured the loan (Brenner testimony, R. 83-88).

the timber footage, stating that at the price of $160,-000.00 it was a good deal and "some money could be made off of it".[10] Blanford asked Brenner for help in financing it. A week later Flinn came to Brenner, according to Brenner in connection with the house Flinn was having built, and Brenner asked Flinn "if that timber could be bought that way, as Blanford had explained it to me". Asked how Blanford had explained it to him he replied that "it had to be sold to an eligible Indian purchaser, and then it could be transferred or sold to a white man, *but it couldn't be sold directly to a white man.* I do remember that conversation about it". (Italics supplied.) Blanford gave Brenner the impression that "only an eligible Indian could buy that property without advertisement and sale by bid. * * * It had to be sold to a good faith Indian purchaser from a qualified Indian seller". Blanford also told him he was in with Marsh, whom Brenner had known for a year, on this transaction, and that the three of them would be "trying to make the deal". Brenner testified that at that time no definite arrangement was made, and that later, around the 6th or 7th of August, an agreement was made that Blanford would get 25% of any profit accruing to the three of them and Marsh and Brenner would get the balance (R. 88-92).

On August 3, 1951, Flinn went along with Brenner to call on defendant, non-appealing, Henry B. Taylor, whose home was 80 miles from The Dalles. Mrs. Taylor was present during the conference. Brenner did the talking, describing the property and the prospect of making money. He "told him all I knew about it, I mean, I didn't know very much of the actual procedure

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[10] The figure of $160,000.00 derived, of course, from the $135,-000.00 figure for the land and the $25,000.00 to be paid to Siniscal.

outside of the fact that Mr. Blanford told me that it had to be sold to an Indian before it could be sold again to a white man". Brenner and Taylor had an understanding how much Taylor was to pay, what Blanford and Marsh were to take, and later on Taylor decided he wouldn't deal on a partnership basis, but would only give them an option (Brenner testimony, R. 94-96).

Brenner further testified that later that day, August 3, Taylor telephoned Brenner that he was interested and came into The Dalles. Taylor wanted to look the property over. Brenner called Blanford who said Marsh would be there to show them the timber. Taylor and his wife, with Brenner, flew to Gold Beach the next day, arriving at noon.[11] There they met Marsh, a cruiser named Newell and, by a strange coincidence, Flinn [12] (R. 97-99). That afternoon they went to the property which is two or three miles from Gold Beach. They spent four or five hours there. There was some discussion as to there being "around 30 or 40 million feet of timber" and that it might be worth $10 [per thousand]. The Taylors and Brenner flew back to The Dalles the next day. Taylor said he was interested in doing something on it, but Brenner did not know anything definite until they came to Portland on August 7 (Brenner testimony, R. 101-104).

Brenner's testimony, so far as his contacts with the Taylors and the trip to Gold Beach are concerned, was fully corroborated by Taylor in his pretrial deposi-

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[11] Brenner testified he paid for the plane trip to Gold Beach and for the plane in which he and Taylor flew to Portland on August 7 to conclude the transaction, but could not recall whether he picked up Taylor's check at the hotel in Gold Beach for the night of August 3 (R. 121).

[12] Brenner denied any knowledge of how Flinn learned they were going to Gold Beach to look at the property (R. 119).

tion (R. 842-925) and by his testimony at the trial (R. 661-690). He testified that on the inspection of the timber there had been some discussion about there being 30,000,000 feet of timber, but that he was "going on his own judgment" and "I felt plumb well satisfied it was there after looking over the timber". "I felt there was a good profit there", showing he had already been advised of the $160,000.00 price (R. 873). When he examined the timber he made no inquiry as to what similar timber was selling for in Gold Beach because "I knew what I could get for the logs" (R. 918).

Taylor was told that "we couldn't deal direct with an Indian, but it had to come through the Bureau of Indian Affairs". Brenner had told him at his house in The Dalles that it had to be bought through another Indian. He testified that he understood that he could not buy it and that "it had to be sold to a good-faith Indian purchaser" and that when he got to Portland on August 7, 1951, he learned Mrs. Siniscal was the Indian from whom he had to get his deed (R. 877-880).

On August 6, 1951, appellants Reed and Siniscal appeared at the Indian Office and there the mechanics of the project swiftly emerged.[13] There Siniscal made an application for removal of restrictions on the sale or encumbrance of the land in question. (Ex. 9, R. 172-177.) At that time, of course, no instrument had been executed purporting to give her any interest in the property. This application form calls for considerable information regarding the financial status of the applicant. The purpose of the form is to establish competency of the applicant so that restrictions upon

[13] Siniscal explained that Blanford told her to come to Swann Island and she telephoned her father and he accompanied her (R. 813-814).

property can be safely removed, and the Indian entrusted with its future disposition.

Appellant Reed testified that "we [Reed and his daughter Siniscal] made out the application in La France's office at the Agency. Mr. Schmitt, counsel for Mrs. Siniscal, accompanied them to the Agency, but "Schmitt was outside". Although Mr. Schmitt was representing Siniscal, Reed did not want him to see the application. "I was her advisor. I was the proper person to advise her". (Reed testimony, R. 963-964.)

La France testified he prepared the application, using information as supplied by Reed and Siniscal (R. 170, 202-203). The application so prepared, and signed by appellant Siniscal (Ex. 9, R. 172-177), shows Siniscal as having an income during the preceding twelve months of $20,000.00 from business, which is ascribed to a one-half interest in a seafood and grocery market, and also claimed an average annual income for the past three years of $10,000 gross (R. 174). She further claimed she owned personal property consisting of household goods ($1500), automobile ($2500), ½ interest in business equipment ($4000), and real estate valued at $17,000 (R. 175). Siniscal, in her deposition, with regard to these items testified that the income claimed was based on her father's income (R. 798-799). She had never filed an income tax return in connection with that business, and the $10,000.00 yearly average income she had claimed was the income from the same business (R. 800). She evaded a question as to whether she ever received any of such income, stating she had received "considerable assistance from my parents" (R. 800-801). As to real estate, listed by Siniscal as her town property at a value of $17,000.00 (R. 175), Siniscal

admitted: "That is my mother's ranch and the real property consisting of the market which is located in Cutler City" (R. 801).

In a statement given prior to her deposition to Government agent Hoppenjans, Siniscal had stated "I do not own any property in Portland or elsewhere" (R. 786). By the time her deposition was taken, she stated: "I would like to dispute that statement because I have *a daughter's interest* in *my father's property* and also in *my mother's property*" (R. 786, italics supplied). Her claim that she owned a half-interest in her father's property she also rested upon her having "a silent partnership in my father's business as I put $600.00 in my father's market and seafood business * * *". She asserted an interest in her mother's property because it "was given my mother on my grandfather's death and is to be passed from one daughter to another until there was a refusal of one to take it" (R. 795-796).

Reed, since he had participated in the giving of the information contained in the application, naturally sought to make the same explanation. He testified that the business cost him $12,000.00 in 1944 and, lacking $600.00 of the $5,000.00 down payment, Siniscal supplied it. He testified there was no partnership agreement. Siniscal's interest in the business was not fixed. "There was no specific amount" and he figured that "she actually put $600.00 in it and that was her equity in it" (R. 944-945).

The final gem in Siniscal's application for removal of restrictions was her answer of "no" to the question "Have you made an agreement to sell your land", i.e., the land from which she was asking removal of restrictions, to which she replied "no" (R. 176).

The record shows that on October 9, 1951, two months after the transaction in question here, Reed filed an application for removal of restrictions on 86.7 acres of land. Its signing was readily admitted by Reed (R. 942). The application appears as Ex. 27, R. 206-211. Identical information to that contained in the Siniscal application and hereinbefore recited was given by Reed. Reed testified that an automobile ($2500.00), farm machinery ($1500.00) and business equipment ($4000.00) claimed in both Siniscal's and his application were in his and his wife's name (R. 946-947). Reed readily admitted the application was a duplicate of Siniscal's (R. 947). He sought to explain it on the basis of Siniscal's having given him $600.00 when he bought the market, and on the general proposition that all the family had an interest in the property.[14]

La France, Flinn's subordinate, testified that the information in the application of Siniscal was supplied by Reed and Siniscal (R. 170-171), and that he had no reason to disbelieve it, that the subsequent order removing restrictions was based on the application, and that he would not have approved the application had he known it was false (R. 181, 183-184).

Another instrument prepared by La France at the Indian Office was an Order Transferring Inherited Interests in Indian Land (Ex. 5, R. 163-166). Where inherited allotted land is held by the United States in trust for one Indian and such Indian validly sells his interest to another Indian or to an Indian tribe, the

[14] This unique system of property law was quite flexible and Reed could abandon it when it suited his purpose. Asked if, under his theory, he would have an interest in the $25,000.00 Siniscal was to get from the Taylors, Reed denied it. Asked if the $25,000.00 was "the only thing that you don't own together" he replied "That is right" (R. 957-958).

practice is to have this reflected on the Government's record by an order which transfers the interest of the selling Indian to the buying Indian, the fee remaining in the United States in trust for the purchasing Indian. Two standard forms for transferring inherited interests are in use and were put into the record of this case. Exhibit 21, R. 160-162, is a form for use in transferring the inherited interest of one Indian to another Indian. It specifically and expressly states that it relates to lands which were allotted under the General Allotment Act, and thus was perfectly suited to effectuate any valid transfer of the interests of Grant and Thornton. The closing paragraph provides "that the conveyance so made shall not in any manner operate to remove any of the restrictions resting against said land or terminate or otherwise remove any trust or other conditions imposed there against" (R. 162). The other standard form (Ex. 22, R. 166-169) differs in this respect. It is not addressed to General Allotment Act land and it requires title to the land to be taken in the name of the United States in trust for blank, pursuant to the Act of June 18, 1934, 49 Stat. 984. Section 5 of that Act provides "that the Secretary of the Interior may acquire by purchase, gift * * * any interest in lands * * * for the purpose of providing land for Indians" and also that title must be taken in the name of the United States in trust for the particular tribe of Indians for whom it is acquired.[15] Exhibit 22 is obviously inappropriate to the transaction here involved, but it may be noted that under either form, the fee title remains in the Government after the transfer is made.

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[15] No such provision is included in the General Allotment Act type (Ex. 21) for the simple reason that the title is already in the United States under that Act.

A comparison of the order in this case (Ex. 5, R. 163-166) with standard form Exhibit 21 (R. 160-163) shows that, with the exception of the last paragraph, the two are identical. But instead of the last paragraph providing, as in the standard form, for no change in the trust status of the property, with the fee in the United States, substitute language was inserted to provide that the inherited interests of Grant and Thornton in the property "is hereby transferred to Ernestine C. Siniscal * * *, subject to the express condition that these lands shall not be alienated, sold, or encumbered without the consent of the Secretary of the Interior."

Questioned about this extraordinary action La France attempted to say that Exhibit 21, the standard form, "was used only when we were dealing with a tribal sale". This was palpably untrue, because Exhibit 21 has no such function and, as stated, it is clear that La France actually used Exhibit 21, but made the change above-noted. La France admitted dictating the changed provision. He also acknowledged that no such form as Exhibit 5, the altered form, had ever before been used (R. 158-159, see also Fdg. III, R. 57). Asked why he changed it, he lamely stated that "I was given to understand that Exhibits 21 and 22 were not a standard form". Then he gave the real reason for the change, stating that Exhibits 21 and 22 "didn't quite fit the order removing restrictions; so they were made to conform to that basis". Asked who gave him such understanding, he answered "Mr. Flinn" (R. 169-170). That La France had been less than candid in this early testimony, and that in making the change he was following the orders of Flinn, the Government's since deposed Realty Officer at the Agency, is made clear by the follow-

ing question and La France's answer while under examination by the trial judge when he was recalled to testify later in the trial (R. 761).

> Q. In other words, you thought that Exhibit No. 21 would have been satisfactory, but Flinn's suggestion was that you make changes in the last paragraph, is that right?
> A. Yes, sir.

And of course, Flinn told him just what changes he wanted.

The Area Director, E. Morgan Pryse, had not been at the Indian Office at Swann Island from June 27, when he was called to Washington, to August 6, and upon his return found a backlog of work (R. 281). Part of the backlog was the transaction here involved, which was placed before him on August 7, 1951. Asked if any party had ever talked with him about this sale or purported sale, he replied that the matter was brought to his attention by La France on August 7. He had not had anything to do with the case (R. 282-283). He further testified that nothing in the file indicated a sale to anyone but Siniscal (R. 285).

In approving these orders, he passed on the transaction on the basis of the papers alone and what La France told him about it. But he did not know that the order transferring inherited interests had been changed for this transaction (R. 291). "The record showed that it had been appraised by competent men—at least I thought so" (Pryse testimony, R. 373).

Meanwhile, On August 7, the final steps were being taken by the Taylors and Brenner who flew into Portland and met Blandford and Marsh. This meeting had already been arranged. Taylor on arrival in Portland

advised Brenner that the partnership arrangement was off, that he would give Brenner and Marsh an option to purchase the land for $300,000.00, but refused an option at $260,000. The option (Ex. 6, R. 109-111) was signed after the "deal" was completed. (Brenner testimony, R. 104-105.) Taylor confirmed this (R. 670, 892).

Taylor testified he met Siniscal and Reed that morning in the office of Taylor's counsel, Mr. Henderson, before they went out to the Indian Office. "There was no conversation at all any more than that they were having these deeds drawn up". The deed was for "the Indian Land at Gold Beach from Mrs. Siniscal to Mr. or Mrs. Ben Taylor" (R. 881-882). The deed (Ex. 10, R. 438) was signed by Siniscal at that time, and "we went up to the Bureau of Indian Affairs".[16] (R. 883.)

They went to the Indian Office about 2 p.m., where they met La France. In the office were Taylor, Siniscal, and the latter's lawyer, Mr. Schmitt. "There wasn't very much said. I turned over this here check for $135,000.00" (Taylor testimony, R. 885). He had procured the check the day before, August 6, (R. 886). The check, Exhibit 1, R. 194, bears a notation reading "This check is in payment of an obligation to the United States and must be paid at par", and under that the name "Ben Taylor" and "Purchased by". After agreeing that he bought the cashier's check, Government counsel asked: "And you noted that you were purchaser of the land; you were buying that as purchaser of the land? A. That is right." (R. 887.)

Upon return to Henderson's office, revenue stamps

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[16] A second deed was given on August 10, 1951, it having been learned that Siniscal's divorce did not become effective until August 8. That deed was, of course, cancelled by the court below (R. 67).

were affixed to Siniscal's deed to the Taylors (R. 884). At the same time an agreement placing $25,000.00 in escrow for Siniscal pending a determination that the Taylors had good title was drawn up (Ex. 2A, R. 433-436). Also the option to Brenner and Marsh was executed, thus completing the transaction.

3. *Evidence of Value of the Property:*—It remains to be noted that the Government introduced testimony as to the market value of the property on August 7, 1951, in support of its allegation that it was worth in excess of $300,000.00 and that the consideration of $135,000.00 was grossly inadequate. Appellants (Br. 19) say only that "There was a conflict between the witnesses as to the market value of the timber and the market price." Implicit here is an admission that there is substantial credible evidence in the record supporting the court's finding of gross inadequacy. We might leave the matter there, but we proceed to show briefly that the finding is amply supported.

David H. Miller, general manager of Moore-Hill Lumber Company, testified that his company made a cruise of the timber in 1951, and on the basis of that cruise (Ex. 36, original) the timber had a market value of $416,000.00 (R. 241).[17]

Herbert W. Crook, a timber speculator, testified the

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[17] This witness had previously testified his company offered $416,000.00 for it, and on objection it was stricken (R. 241). But on cross-examination by Mr. Nikoloric, counsel for Alexander, the subject was reopened (R. 255), the witness testified the offer was made on November 26, 1951, (R. 257), and that it was offered to Marsh, in the presence of Brenner, Mrs. Marsh, and Blanford. (R. 263). That the offer was made was confirmed by Taylor, who testified that the offer was not made to him and that he first learned of it from Brenner, who told him about it "late in the year—last year sometime" (R. 673-674). And, asking a defense witness about it later in the trial, the court below referred to it as "a firm offer" (R. 651-652).

timber had a value of around $13.00 (R. 395), and Jesse W. Forrest, general manager of the Coos Bay Lumber Company, testified "We would be willing to pay at least $10 per thousand (R. 424).[18]

Charles M. Lord, a forester in the United States Forest Service testified that the timber was cruised by himself and five others over a period of four weeks and that the timber footage was 34,126,000.38 (R. 311-318).[19] The cruise (Ex. 57, original) was admitted in evidence. (R. 315).

W. E. Bates, a forester in the Forest Service, testified that on the basis of that cruise the timber had a value of $432,228.10 (R. 486). He also testified that in 1951 the Department of Agriculture under public bidding had made six sales of timber in the Siskiyou National Forest. This was five or six miles from Gold Beach where the property in this suit was located (R. 483). 6.4 million feet were sold at $29.55 per thousand, 6.6 million feet sold at $26.80, 19.2 million feet sold at $22.75, 7.1 million feet sold at $15.50, 1.2 million feet sold at $11.45 and ½ million feet sold at $20.90 (R. 534-536). The witness classified the timber in some instances as better and in others as poorer than the Grant and Thornton timber, but $11.75 was the lowest price on any of it.[20]

There is thus an abundance of support for the trial court's finding that the consideration of $135,000.00

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[18] It will be remembered that Gray, when he appraised the timber in mid May, 1951, had used a figure of $5.50 per thousand (R. 145).

[19] Gray, on the basis only of Wilkes' 25-year old cruise, had "estimated" 24,000,000 feet (R. 145).

[20] Originally, both this witness's valuation of $432,228.10 and his testimony on these sales were stricken on objection (R. 492, 542). The court later reversed this ruling (R. 565-566) and the court used the sales in examining defense witness Fry (R. 647-648, 651).

was grossly inadequate and no occasion arises for dealing with defense testimony.[21]

4. *The Findings of Fact and Conclusions of Law:*— These are fully set out in the Government's opening brief as appellant (pp. 5-10) and will merely be summarized here. The Taylors agreed to pay $25,000.00 to whatever Indian delivered the title to them, they paid the $135,000.00 to the Indian Agency and put $25,000.00 in escrow for Siniscal (Fdg. 4, R. 24-25). Siniscal was a mere agent for hire and a conduit for title in behalf of the Taylors. Siniscal was not an Indian within the meaning of the regulations contained in 25 C.F.R. 241 and in particular Section 241.11 (Fdg. V, R. 57).[22] Siniscal made false representations as to her status, financial responsibility and intentions to E. Morgan Pryse, Area Director (Fdg. VI, R. 57). The Taylors and their agent, Siniscal, and others concealed from Pryse the fact that the Taylors were in truth the real

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[21] The defendants produced five witnesses who testified to values of $5 to $7 per thousand. Three were interested witnesses—Alexander, Mrs. Alexander, and De Gross, who had the contract with Taylor to log this property (R. 612, 621). The reaction of the court below to this testimony is shown at R. 689, where, addressing counsel for the Taylors and referring to Taylor's refusal on August 7 to give an option to Brenner and Marsh at $260,000.00, taking a profit of $100,000.00, the court said: "Mr. Henderson, you have put on a lot of testimony to the effect it was worth only $5.00 per thousand. It doesn't go too well when on the day that Mr. Taylor purchased it and sold it on option, he refused to sell the option for $260.000.00."

[22] 25 C.F.R. 241.9 provides for sales to an Indian tribe of heirship lands on all reservations for a reasonable consideration administratively determined. This is inapplicable here, since this was not a sale to a tribe. Sec. 241.10, providing for sale to the United States in trust, is likewise inapplicable. Sec. 241.11 is the only section in the regulations allowing sale to an individual Indian "without the consent of the heirs, without calling for bids or after bids have been called for." Following this is a series of regulations applicable "in cases where sales cannot be made pursuant to Sections 241.9, 241.10, 241.11" (sec. 241.12). These regulations, particularly 241.25 through 241.29, make clear that a sale of the land in suit to a non-Indian must be made through competitive bidding.

buyers (Fdg. VII, R. 58). The consideration of $135,-000.00 was "grossly inadequate and shocking to public conscience" and Pryse was unaware of the true value of the property (Fdg. VIII, R. 58). The evidence "clearly, certainly and convincingly establishes" that the Taylors and those in concert with them knew a publicly advertised sale was required unless a sale was made to a bona fide Indian purchaser and used Siniscal as a subterfuge to avoid that requirement, and "the true identity of defendants Taylor as purchasers was concealed." (Fdg. IX, R. 58). By reason of the foregoing false representations and concealment Pryse signed the Order Transferring Inherited Interests and the Order Removing Restrictions, and would not have done so had he known the facts (Fdg. XI, R. 59).

The court concluded that Siniscal, as a mere conduit of title, was not an Indian purchaser within regulations 25 C.F.R. Part 241 (Concl. II, R. 60). The orders removing restrictions and transferring inherited interests were beyond the authority of the Area Director and hence null and void (Concl. III, R. 60). Likewise the deed from Siniscal to the Taylors and the contract between Siniscal and the Taylors are null and void (Concl. IV, R. 60) and by reason of the fraud and gross inadequacy of consideration the entire transaction should be rescinded (Concl. VI, R. 61).[23] Judgment was entered accordingly (R. 66-69).

ARGUMENT

The brief of appellants does not state what relief they want from this Court. Siniscal's only right is against

[23] The court's further conclusions that the Taylors are entitled to be made whole and that the property must be sold by the Government for that purpose, and similar provisions in the judgment, are the subject of the Government's cross-appeal.

the Taylors to obtain the $25,000.00 placed in escrow for her by them and the only relief she could possibly receive would be against them.[24] Her interest in the property, assuming she ever had any, admittedly passed by deed to the Taylors, and as between the Taylors and the United States, the judgment herein has become final insofar as title to the property is concerned. While it would thus appear that the onus of answering appellants is on the Taylors, we proceed to present argument.

I

The Trial Court Did Not Err in Adjudicating That the Transaction by Which the Government's Title Was Sought to Be Divested Was Fraudulent and Void.

Nothing other than a reading of the evidence in this case, which we have documented in the statement (*supra,* pp. 2-20), is needed to establish the fact that Siniscal was a mere straw used by the Taylors as a channel by which they could buy the property and that the motive was to avoid a sale under competitive bidding and thus acquire the property for $135,000.00. They were not themselves eligible to buy at that price, and they sought to evade the law which made them ineligible by using Siniscal. Siniscal herself referred to the $25,000.00 she was to get as her "commission" (R. 782) and at R. 788 readily agreed it was a commission for her taking a deed. Appellants in their brief unwittingly conceded she was being paid for services as a straw at Br. 5 where they refer to the $25,000.00 as "a fee for her services."

Thus this case is exactly like *United States* v. *Trinidad Coal Co.,* 137 U.S. 160 (1898). There the company,

[24] Reed has no interest of record in anything, since his only claim was for $12,500.00 against Alexander, which fell by the wayside.

ineligible under the law to acquire more than 320 acres of public land, gave certain officers and employees the money with which to file individual entries, the company having taken deeds from them in advance. The entries were made, patents issued, and as a result the company had deeds to 954 acres. The Government sued to cancel the patents. Answering a contention that the bill alleging the above facts did not state a case, the court said (137 U.S. at pp. 166, 167):

> * * * This contention cannot be sustained unless the court lends its aid to make successful a mere device to evade the statute. The policy adopted for disposing of the vacant coal lands of the United States should not be frustrated in this way. It was for Congress to prescribe the conditions under which individuals and associations of individuals might acquire these lands, and its intention should not be defeated by a narrow construction of the Statute. If the scheme described in the bill be upheld as consistent with the statute, it is easy to see that the prohibition upon an association entering more than three hundred and twenty acres * * * would be of no value whatever. * * * There is * * * no escape from the conclusion that the lands in question were fraudulently obtained from the United States. We say fraudulently obtained, because if the facts admitted by the demurrer had been set out in the papers filed in the land office, the patent sought to be cancelled could not have been issued without violating the statute. * * *

Answering a contention that the individuals had a right, on their own responsibility, to make an entry under the statute and later dispose of it, the court stated (p. 168) "The case before us is not of that class."

So here, the policy of the regulations requiring competitive bidding in a sale to a non-Indian "should not be frustrated in this way," and if the scheme shown in this record were to be sustained, the law requiring sale to a non-Indian to be under competitive bidding would be meaningless. And while Siniscal, as an Indian, was entitled to purchase in her own right without competitive bidding, "The case before us is not of that class."

Similarly in *Causey* v. *United States,* 240 U.S. 399 (1915). Causey made an oath required by law that he had not and would not make any contract whereby title to land on which he made a homestead entry would inure to the benefit of another and at the time of final entry presented proof to the same effect and paid the statutory price. The Government later sued to recover title on the ground that the oath and proof were false and was granted relief. Causey was in the same position as is Siniscal in this case. He was, while posing as acquiring the land for himself, actually acting for another. And just as federal policy and law were violated in the above case, it has been violated here.

Those cases also show that inadequacy of consideration need not be established in order for the Government to prevail in such a case because the full statutory price had been paid in each instance. "* * * The financial element in the transaction is not the sole or principal thing involved. This suit was brought to vindicate the policy of the government * * * ." *Pan-American Co.* v. *United States,* 273 U. S. 456, 509 (1927). However, as we have shown, and the court below has found, the consideration paid in this case was grossly inadequate.[25]

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[25] At Br. 19 appellants harp on Gray's appraisal, stating "There always is a presumption that an official duty has been honestly and

That the fraud practiced upon the Area Director Pryse and the Government was participated in by Government employees, even to the extent of devising special instruments to effect the transfer, is clearly indicated by the record. But the right of the Government to protection against the defendants cannot be affected by the fact that its employees are corrupted rather than misled. *Pan American Petroleum Co.* v. *United States*, 9 F. 2d 761 (C.A. 9, 1926), affirmed 273 U. S. 456.

II

The Order Transferring Inherited Interests and the Order Removing Restrictions Were Beyond the Authority of the Area Director, Violative of Federal Laws and Regulations, and Are Void.

The trial court held that the approval of the Order Transferring Inherited Interests and the Order Removing Restrictions on Siniscal were beyond the authority of the Area Director and are null and void (Concl. III, R. 60). This constitutes an independent ground of judgment if it is correct. In this respect the case differs from the cases hereinbefore cited, where the acts of government officials were within their *powers* but were procured through fraud to be done in behalf

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regularly performed." True, but the contrary can be shown. Moreover, even if the appraisal had been an honest one, by a competent appraiser who viewed the land as required by 25 C.F.R., 241.24, Taylor still could not legally buy it at that figure except at a competitive sale where he was the only bidder. An appraisal merely establishes a minimum value for which it may be sold under bidding, 25 C.F.R. sec. 241.24. Also at the bottom of the page it is stated that "Inadequacy of consideration is not significant in suits over Indian lands." Presumably they mean that where Indian lands are fraudulently obtained from the Government, the circumstance that the Government was badly overreached has no tendency to establish fraud. The cases they cite, only one of which involves Indians, do not establish that proposition.

of ineligible purchasers. We proceed to demonstrate that, although Pryse signed these orders without knowing their character, they were beyond his authority and hence violative of the law and void.

As the court below found (Fdg. II, R. 56), the authority of the Area Director derives from Order 551 of the Commissioner of Indian Affairs, 16 C.F.R. 2939. By section 3 of that order the authority of the Commissioner is delegated to Area Directors "in the following classes of matters." Manifestly the Commissioner could not delegate authority he did not have. The Commissioner's authority is found in the regulations of the Secretary. So far as issuing fee patents to land allotted under the General Alloment Act is concerned, his authority is prescribed in 25 C.F.R. Part 241. There is no regulation empowering the Commissioner to issue fee patents. And the authority of Pryse with regard to issuance of a fee patent to the land in suit was limited by section 4 of Order 551 delegating to the Area Director "The approval of *applications* for fee patents, pursuant to the provisions of 25 C.F.R. Part 241." (Italics supplied.) Thus, while Pryse could recommend to the Secretary that a fee patent issue, he himself could not issue it.[26]

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[26] Six times in appellant's brief it is stated that a fee patent was issued to Siniscal (applicants' brief 8, 9, 14, 25, 26, 24). At Br. 26 it is stated that the Secretary of the Interior "issued a patent to Siniscal on September 26, 1951, and delivered it to the Land Office Department of the Indian Bureau, Portland, and there it was held up * * *." Such statements by counsel for appellants are inexcusable. Appellants' counsel, as elsewhere in their brief, cite no record evidence in support of these repeated statements. The court below found as a fact (Fdg. IV, R. 57) that "in fact no patent in fee to the lands here involved has ever been issued by the United States to anyone," and it is not the law that an appellant can overturn a finding of fact by merely stating the contrary. No claim was ever advanced at the trial that a patent had been issued to Siniscal, or

That is why the standard form was altered. If Exhibit 21 (R. 160-163) had been used without change, the fee title remained in the Government and could not be divested by any local official. The change in Exhibit 21 to convert the title status from trust patent land requiring action by the Secretary into a fee in Siniscal with a restriction on alienation, and the use of the order removing restrictions, was made because the Area Director *does* have power to remove restrictions on purchased lands where fee is in the Indian with restrictions on alienation. Removal of restrictions on purchased land is provided for in 25 C.F.R. sec. 241.51. Purchased lands are defined in section 241.49 as lands held by Individual Indians under deeds or other instruments which recite that they "may not be sold or alienated without the consent or approval of the superintendent, the Commissioner of Indian Affairs, or the Secretary of the Interior." Applications for the removal of restrictions are provided for in section 241.51, which further provides that, in approved cases, "an order removing all restrictions against alienation of the land * * * will be issued by the Commissioner of Indian Affairs or his authorized representative." Thus the Commissioner did have authority to create an unrestricted fee in an Indian owning purchased land as defined. And the Area Director became his "authorized representative" with like authority by virtue of section 5 of Order 551, delegating to him "The removal of restrictions against alienation of Indian lands, other than allotted

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even that she had applied for it. There is evidence in the record that Taylors' counsel applied for a patent (R. 590-591, Ex. 70. 71 R. 298-299). These exhibits show an inquiry by the Portland Office in May 1952 as to whether any patent had issued and a reply that none had issued or would issue pending investigation.

lands of the Five Civilized Tribes, pursuant to the provisions of 25 C.F.R., Part 241." [27]

It is thus clear that the alteration of Exhibit 21 incorporated in the Order Transferring Inherited Interests (Ex. 5, R. 163-166) as prepared by La France at Flinn's direction was an attempt to bring the property into a title status over which Pryse had the power to create an unrestricted fee in Siniscal. [28]

The device must, however, fail. We have demonstrated that the only way the fee title of the Government in this property could be divested was by a fee patent issued by the Secretary and that no power to divest the Government's title resided in the Area Director. Therefore any orders of his, no matter how ingenious, were *ultra vires,* violative of federal laws, regulations, and restrictions, and therefore void. *Heckman* v. *United States,* 224 U. S. 413 (1912). And since the Order Removing Restrictions depended for its validity upon an invalid order creating those restrictions, it too was void.

Appellants (Br. 23-25) do not meet the question at all. They parade before the court Exhibit 22 which we have previously shown was entirely inappropriate and was not used in devising the special order here in question. They make no reference to Exhibit 21, which we have shown needed no alteration. They state (Br. 24)

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[27] There is nothing anomalous in the fact that protection at a higher level is afforded in the case of trust patent allotted lands. Allotted lands are provided for the Indian by the Government and in many instances are all he owns. They are an instrumentality of the Government to sustain him. Purchased lands are lands which the Indian himself has acquired.

[28] The change in the customary form and the court's finding that the one here used "was employed in this case for the first time in relation to trust allotted" lands (Fdg. III, R. 56-57) demonstrate the error in appellants' assertions (Br. 12, 28) that this procedure had been followed for many years prior to this transaction.

that "this restriction [the restriction inserted by La France] retained in the Government all of the substance of the restriction of the original trust patents." Assuming that, why did they change Exhibit 21? No answer to that is given by appellants. Again at Br. 25 they state "as we said before, the key to the whole situation was with the Secretary of the Interior." That is right and no power can be shown in the Area Director to take the key away from him. The Secretary has always had it, and he used it when the Taylors applied for a patent, which he refused.

III

Appellant's Contentions Lack Merit

We have shown in points I and II of this brief that, for two independent reasons, the transaction whereby title of the property was sought to be transferred to the Taylors was properly set aside by the court below. For clarity we will now comment upon each of the various headings of appellants' brief.

Point I (Br. 15)—Whatever the contention sought to be made under this heading without citation of authority, it is perfectly clear that the United States has authority to bring an appropriate action to set aside fraudulent and otherwise illegal conveyances of land held in trust for Indians. *Heckman* v. *United States*, 224 U.S. 413 (1912).

Point II (Br. 16)—As shown by the Statement, the court's conclusion that Siniscal was a mere conduit and not an Indian within the meaning of the regulation governing sale to an Indian is fully supported by the evidence. This is obviously not a conclusion that Siniscal is a non-Indian for other purposes.

Point III (Br. 17)—We have shown in point II

supra, that the Order Transferring Inherited Interest and the Order Removing Restrictions were beyond the authority of Pryse. Appellants' pretense that the court was talking of Siniscal having exceeded her authority is preposterous.

Point IV (Br. 17-18)—Inasmuch as the contract between Siniscal and the Taylors was simply one element of the transaction by which title to the property was sought to be transferred from the United States to the Taylors, it was correctly adjudged void.

Points V and VI (Br. 18-23)—In footnote 25, *supra,* p. 19, we have dealt with the appraisal of Mr. Gray, and there demonstrated that the appraisal was not, as appellants say, "the outstanding issue" and that it in no way benefits appellants' case. The facts of record as to the application for removal of restrictions (Statement *supra,* pp. 12-15) constitute a complete answer to this portion of appellants brief.

Points VII and VIII (Br. 23-29)—Appellants' argument on the Order Transferring Inherited Interests is answered under Point II *supra.* There was no fee patent issued to Siniscal on September 26, 1951 (see footnote 26, *supra,* p. 28). The fate of the $25,000 placed in escrow by the Taylors is of no concern to the United States.

Point IX (Br. 29-30)—We agree that the court erred in ordering the land sold, but for reasons stated in our brief as cross-appellant.

Points X and XI (Br. 30-32)—We have demonstrated in Point I *supra,* both on the facts of record and authority, that this transaction was fraudulent. While, as appellants say (Br. 31), "The law never presumes

fraud," the court below did not presume it in this case but unerringly found it on the proof.

Point XII (Br. 33)—Appellants' argument that this suit should have been dismissed in the interest of the Government's wards is self-answering.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below, insofar as it adjudges void the documents purporting to divest the Government of its title, be affirmed.

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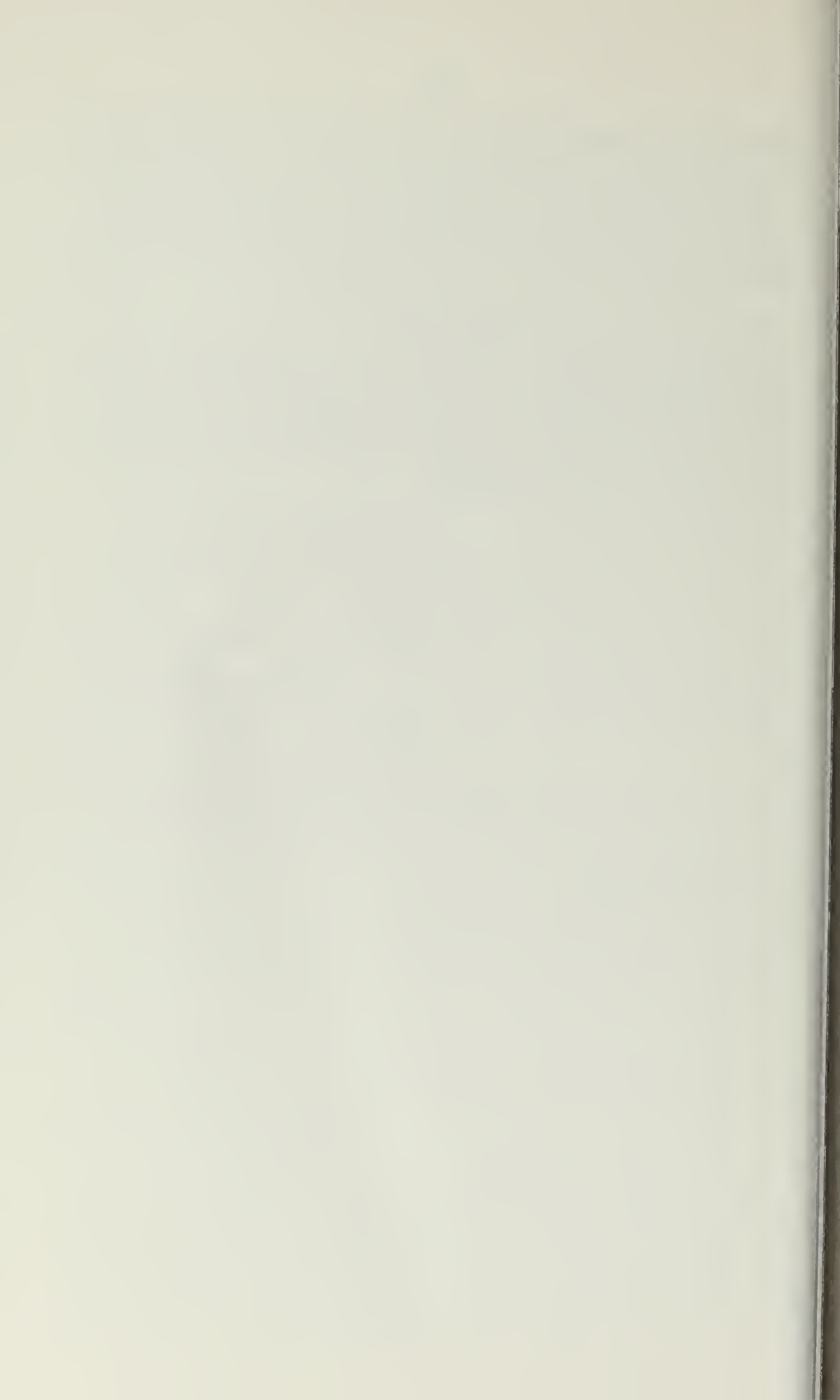

No. 13681

In the United States Court of Appeals for the Ninth Circuit

ERNESTINE C. SINISCAL AND ELMER A. REED,
APPELLANTS

v.

UNITED STATES OF AMERICA, AS TRUSTEE AND GUARDIAN AND EX REL. OF THE ESTATES AND PERSONS OF JASPER GRANT AND HAROLD F. THORNTON; HENRY B. TAYLOR AND ELIZABETH A. TAYLOR, HUSBAND AND WIFE; WILLIAM F. BRENNER AND FRED M. MARSH, APPELLEES

UNITED STATES OF AMERICA, AS TRUSTEE AND GUARDIAN AND EX REL. OF THE ESTATE AND PERSONS OF JASPER GRANT AND HAROLD F. THORNTON, APPELLANT

v.

ERNESTINE C. SINISCAL, ELMER A. REED, HENRY B. TAYLOR AND ELIZABETH A. TAYLOR, HUSBAND AND WIFE, AND S. D. ALEXANDER, APPELLEES

UPON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

REPLY BRIEF OF THE UNITED STATES, APPELLANT

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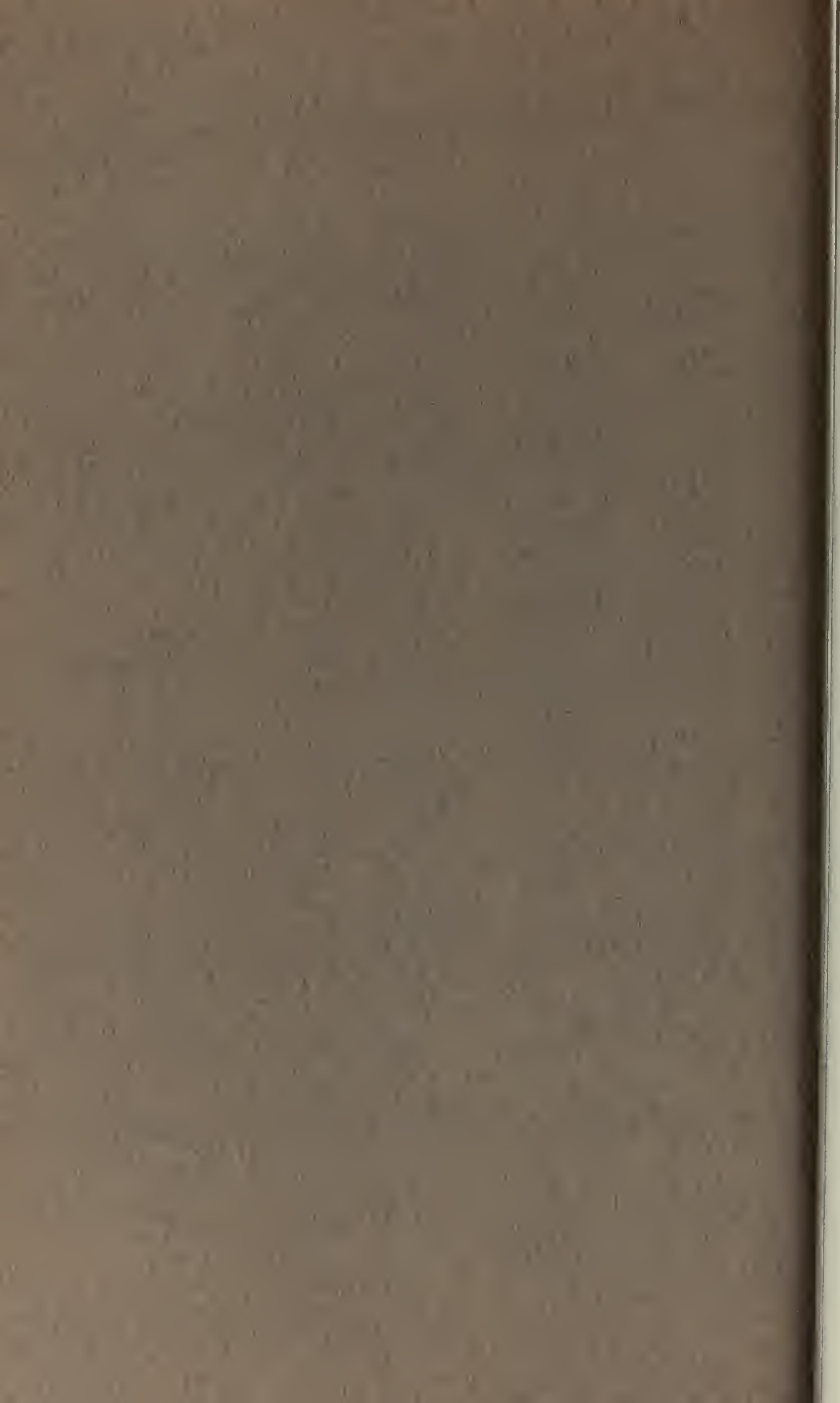

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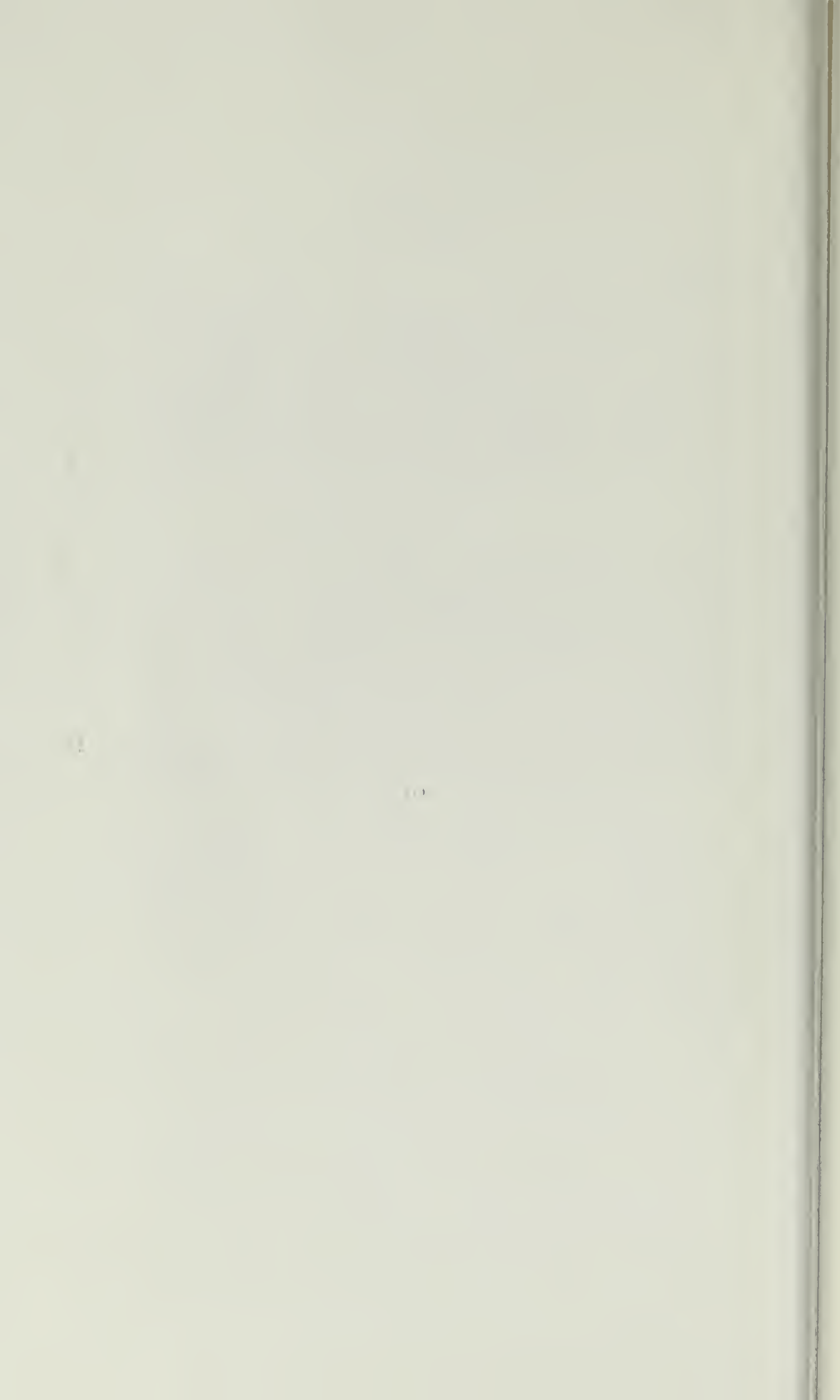

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UPON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

REPLY BRIEF OF THE UNITED STATES, APPELLANT

1. *The question of whether any equities exist in favor of appellees justifying restoration of consid-*

eration is for Congress and not the courts. Appellees Taylor state (Br. 11) that "The record in this case reveals nothing as to the conduct of appellees Henry B. and Elizabeth A. Taylor inconsistent with the Court's Finding and Conclusion that a good cause does exist for the return of the money." Appellees in so stating ignore the primary findings of the court below, which they have not seen fit to challenge by appealing.

Included in those findings is the following:

> The evidence clearly, certainly and convincingly establishes the fact that defendants Taylor, and those acting in concert with them, were aware of the necessity for a publicly advertised sale unless the property were purchased by a bona fide Indian on his or her own behalf and account, and that in order to avoid such requirement, Ernestine C. Siniscal was by subterfuge presented as an acting purchaser, and the true identity of defendants Taylor as purchasers was concealed. (Fdg. IX, R. 58.)

In our statement of the case and in Point I of our brief as appellee on the appeal of Reed and Siniscal we have shown that this finding was fully supported by evidence, as were other findings of the court. And in Point I (pp. 24–27) of that brief, as well as point I of our brief as appellant (pp. 12–22), we have shown that the case is a duplicate of those dealt with in *United States* v. *Trinidad Coal Co.,* 137 U. S. 160 (1890) and *Causey* v. *United States,* 240 U. S. 399 (1915), and that under those decisions two propositions apply here: (1) The Government is entitled to a

decree of cancellation and (2) it is not necessary that the Government restore the consideration to the Taylors.

Appellees (Br. 28) attempt to dismiss those cases, with others relied on by the Government, as inapplicable because of a claimed different "factual situation" and at Brief 16–21 they undertake to make out a case of extenuating circumstances in their favor. But we submit that these cases cannot be thus disposed of. They make plain that what appellees are trying to have this Court do is the very thing rejected in those cases. As stated in the *Trinidad* case (137 U. S. at pp. 170–171):

> * * * If the defendant is entitled, upon a cancellation of the patents fraudulently and illegally obtained from the United States, in the name of others, for its benefit, to a return of the moneys furnished to its agents in order to procure such patents, *we must assume that Congress will make an appropriation for that purpose when it becomes necessary to do so.* * * * [Italics supplied.]

And later in the *Causey* case, the Supreme Court stated (240 U. S. p. 402):

> * * * That rule [that the money must be restored], if applied, would tend to frustrate the policy of the public land laws; and so it is held that the wrongdoer must restore the title unlawfully obtained *and abide the judgment of Congress as to whether the consideration paid shall be refunded.* * * * [Italics supplied.]

The Supreme Court thus stated very plainly that the courts in cases of this kind do not undertake to

determine whether in a given case there are any equities in favor of a wrongdoer justifying a return of the consideration, and that such is a question for Congress alone. As pointed out in our brief as appellant (p. 19), in *Pan-American Petroleum Co.* v. *United States,* 9 F. 2d 761 (C. A. 9, 1926), this Court reversed a trial court in an identical situation. In doing so it did not go into the question of whether, as the trial court had concluded, any equities were established by the evidence, as appellees would have the Court do in this case. This court simply cited and quoted from the *Trinidad* and *Causey* cases, *supra,* and *Heckman* v. *United States* 224 U. S. 413 (1912), and held in effect that the question of equities was foreclosed to the trial court.

This brings us to appellees' treatment of the *Heckman case*. At Brief 27 they regard the *Heckman* decision as holding that if the Indians whose lands the Government there sought to recover had been present as parties, the Government would have been denied relief unless the consideration was restored, and they assert that the Indians were parties in this case because they appeared as witnesses at the trial.

In the first place, appellees cite no authority for the proposition that all witnesses at a trial *ipso facto* become parties to an action, and it is palpably unsound. Thus, appellees' hypothesis fails. But beyond that, it is clear from a reading of that portion of the *Heckman* decision quoted by appellees (Br. 25–26) that the case does not support the absurd proposition that the rights of the Government can be nulli-

fied by the mere device of adding the Indians as parties. When the *Heckman* case arose it had already been settled in the *Trinidad* case that the Government was entitled to prevail without restoration of consideration, and the court's opinion in *Heckman* does not show that it was even urged that the Government's right to cancel depended on restoration of consideration. What *was* urged was that the Indians "should be made parties in order that equitable restoration may be enforced," it being suggested that the Indians might have property unaffected with a governmental interest which could be reached by judgment, *against the Indians, of course.* But the Supreme Court stated that no such case was presented there and that, in such a case, "on a proper showing as to any of the transactions that provision can be made for a return of the consideration, *consistently with the cancelation of the conveyances,*" the court could bring in as a party anyone whose presence for that purpose is found to be necessary (italics supplied). Thus, the court was squarely holding that, irrespective of any return of consideration, the conveyances had to be cancelled, and that return of consideration could be adjudged only against persons other than the Government.

Appellees (Br. 28) similarly distort the decision in *Hall* v. *United States,* 201 F. 2d 886 (C. A. 10, 1953). There Hall relied on *Heckman,* just as appellees seek to, but the court in effect stated that return of consideration had no bearing on the Government's right to cancel, and that the question could not be considered

except as against the Indian, who had not been made a party.[1]

We submit that, on the foregoing authorities, the question of whether equities exist entitling the Taylors to any favorable treatment by way of return of consideration is not for the courts but for Congress alone, and that the court below erred in considering the question.

2. *The district court's "finding" that good cause exists for a return of the consideration to the Taylors does not aid appellees.* Appellees, perforce, rely heavily (Br. 21–24) on the purported "finding" of the court below that good cause exists for a return of the consideration (Fig. XII, R. 59), and seek to lay upon the Government the burden of showing that the finding is "clearly erroneous." But, as the cases hereinbefore cited show, the court below erred in entertaining this question at all and the "finding" necessarily falls.

However, even if the question were one for the courts to pass upon, the so-called "finding" that good cause exists in this case cannot have the effect attributed to it by appellees. "Good cause" is clearly not a fact in itself but a conclusion which must find support in facts found by the court. We pointed this out in our opening brief (fn. 8, p. 21), and we think it is confirmed by appellees' statement (Br. 14)

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[1] It may be noted that the decisions in the *Heckman* and *Hall* cases necessarily establish the proposition that the Indians are not made parties by reason of the Government's having sued to protect its interests, and that they must be specially brought in in order to make them such.

that "'good cause' as a fact belongs in the same category with 'fraud,' 'negligence,' and other legal terms *that really are the summary of various independent facts.*" [Italics supplied.]

We agree with the coupling of "good cause" with "fraud" and "negligence," and we also agree that they must be arrived at from the "various independent facts" as found by the court. *Dalehite* v. *United States,* 346 U. S. 15 (1953) was a case brought against the Government under the Tort Claims Act. The court there was confronted with findings of the trial court of "causal negligence", which had been characterized by the court of appeals as "profuse, prolific and sweeping." The Supreme Court held that, even accepting such findings, no case was made within the Tort Claims Act. Notwithstanding, the court took occasion to issue a warning to district courts (a warning of which the lower court in this case did not, of course, have the benefit when it decided this case). Of the "findings" of negligence the court stated (346 U. S., p. 24, fn. 8):

> * * * Fed. Rules Civ. Proc., Rule 52 (a), in terms, contemplates a system of findings which are *"of fact"* and which are concise. The well-recognized difficulty of distinguishing between law and fact clearly does not absolve district courts of their duty in hard and complex cases to make a studied effort toward definiteness. *Statements conclusory in nature are to be eschewed in favor of statements of the preliminary and basic facts on which the District Court relied.* [Italics supplied.]

Accepting appellees' concession that "good cause" and "negligence" are comparable in the light of the law, it is apparent that in the *Dalehite* case the Supreme Court dealt the death blow to appellees' reliance on the trial court's "finding" of good cause and on Rule 52 (a), F. R. C. P.

Moreover, the "preliminary and basic facts" to which the Supreme Court alluded were found in this case by the court below. Appellees, not having appealed, do not challenge them. Instead, they state (Br. 22):

> As a matter of fact, the Findings are not contradictory. The Court, apparently, concluded that the constructive fraud which it made the basis for recission was not of such a nature or so attributable to Appellees Taylor as to justify withholding from such appellees the money they had paid under the circumstances.

We agree that the court below, for some reason, thought the Taylors should have their money back. But no basis for that view is to be found in the factual findings that the court did make. These findings were exhaustive and covered every phase of the case (see our opening brief, pp. 5–9). It is utterly impossible to find in these findings any preliminary or basic facts which would tend to support the trial court's "finding" of good cause, and appellees make no attempt to do so on the basis of the findings.

3. *Appellees' "FACTUAL BASIS FOR GOOD CAUSE" (Br. 16) does not establish that good cause*

exists for the return to the Taylors of the consideration paid. Even if the evidence could be examined on this question, appellees' purported "Factual Basis for good cause" (Br. 16–21) contains nothing that in any way supports their contention that they are entitled to be reimbursed. Appellees ignore the trial court's findings that the Taylors understood the law, sought to evade it, and employed Siniscal as a mere conduit or straw to accomplish that end (Fdgs. VII–IX, R. 58).

Appellees first point out (Br. 16–17) that their first contact with this transaction was on August 3, 1951, and that by that time the land had already been appraised by Gray at $135,000.00 and consents to sale had been obtained from the Indians. But these events are irrelevant to the findings of the court below that the Taylors had actual ("constructive" would suffice) notice of the law requiring a public sale at competitive bidding unless the sale were to an Indian, and that they deliberately employed Siniscal as an Indian for a fee to pose as a purchaser, the Taylors putting up the money, the Taylors securing the execution of the deed to them by Siniscal in advance (see Government brief as appellee on appeal of Reed and Siniscal, p. 19).[2]

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[2] In the Government's brief as appellee on the appeal of Reed and Siniscal, pp. 3–5, fn. 25, pp. 26–27. it is demonstrated that (1) the appraisal of Gray was a sham, (2) that it was illegal, and (3) that in any event it did not permit a sale to Taylor without competitive bidding. And the Taylors' agreement to pay Siniscal $25,000.00 for her services shows that they well knew it. Their insistence on $300,000.00 as the option price to Brenner and Marsh also shows they knew the appraisal was way low. The consents to sale by Grant and Thornton are unimportant in this case.

Similarly the fact that the Taylors never met Pryse (Br. 17), has no tendency to absolve the Taylors of those findings.

Appellees' reference to the check having borne the notation "Purchased by Ben Taylor" as showing the Taylors were not concealing their identity or the source of the money is interesting, but it confirms the fact that they were the real purchasers and using Siniscal as a screen. (See R. 887.)

At Brief 18–19, reference is made by appellees to Exhibit 14, Original, and the statement therein that the Application For Removal of Restrictions on Siniscal was coincident with the approval of the Order Transferring Inherited Interests, as apprising the office in Washington "of exactly what had been done." This is not true. It did not inform the Washington office of the fact that Siniscal was a mere tool employed by the Taylors to avoid the requirement of competitive bidding, or that a standard form had been mutilated as a step in the scheme. Moreover, it has no tendency to prove that the Taylors were not, as the court below found, well aware of the law and guilty of a scheme to acquire the property in fraud of that law.

At Brief 19–20 (par. h) and at Brief 20 (par. k) appellees make it appear that Pryse, the Area Director, testified he had the authority to sign the Order Transferring Inherited Interests and the Order Removing Restrictions. This again has no tendency to weaken the court's findings that the Taylors well knew the illegality of the project. Moreover, Pryse was not aware at the time he signed these orders that

the lands were General Allotment Act lands, title to which had been tampered with by mutilation of a federal form and, as the Court (Fdg. XI, R. 59) stated, Pryse would not have signed those orders "had he known the true facts." (Government's brief as appellee on the appeal of Reed and Siniscal, p. 18).

Similarly (Br. 20) appellees cite La France's testimony that he considered Section 202.04 (c) (2) of the Indian Affairs Manual (Ex. 41, Original) as authorizing the preparation of the Order Transferring Inherited Interests. This again has no tendency to change the status of the Taylors in this transaction.[3] Appellees state (Br. 20) that "at no juncture of this case has the inapplicability of these sections been demonstrated, and that the only basis for the contention of *ultra vires* is that Ernestine C. Siniscal, in making her application (Ex. 9, R. 172) exaggerated her financial worth." Appellees thus adopt the device of Siniscal and Reed in their brief

[3] Appellees quote from this section of the Indian Manual, but they do not quote enough. The section later provides for an Order Transferring Inherited Interests identified as "Exhibit No. 5 of the Appendix" to the manual. Exhibit No. 5 is a form substantially like Exhibit 22, R. 166, and has to do with acquisition for a tribe, title to be in the United States in trust. At pp. 15–18 of our brief as appellee on the appeal of Reed and Siniscal, we demonstrate that Exhibit 22 was not used by La France, was not appropriate to the transfer attempted here, and for like reasons section 202.04 (c) (2) and Exhibit 5 show no authority for La France's action. And of course appellees do not pursue La France's further testimony on this subject that the order used in this case had never before been used (R. 158–159, Fdg. III, R. 57), that Exhibit 21 (used in this case but altered) and Exhibit 22 did not fit the Order Removing Restrictions, that the change was made by him at Flinn's suggestion (R. 169–170), and his final admission that he considered Exhibit 21 suitable but changed it at Flinn's bidding (R. 761).

(p. 17) where they dispose of the *ultra vires* finding on the absurd pretense that the court below must have meant that Siniscal's act was *ultra vires.* That the Order Transferring Inherited Interests used in this case and the interdependent Order Removing Restrictions were unlawful and thus were *ultra vires* is fully demonstrated in Point II (pp. 27–31) of the Government's brief as appellee on the appeal of Reed and Siniscal.

Finally, appellees say (Br. 21) that "This is not a case where the money was paid to the Indians" and that the Taylors have not imposed upon the Indians because the Taylors never had met them! The fact that the money was paid to the Government's agents has, of course, no tendency to alter the fact that a fraud was perpetrated here. The statutory price was paid to the Government's agents in both the *Trinidad* and *Causey* cases, *supra.* Thus in the *Trinidad* case, 137 U. S. p. 170, the court speaks of the money paid as "moneys furnished to its [the Government's] agents in order to procure such patents." And this Court will have little difficulty in perceiving a flaw in appellees' theory that the Indians Grant and Thorton were not imposed upon by the Taylors because they had never met.

In summary, the unchallenged findings of the court below, amply sustained by the evidence, are that the Taylors, well knowing their ineligibility under the law to purchase the property except at a public, competitive sale, deliberately sought to evade the law by offering Siniscal $25,000.00 to pose as an Indian buying in her own right. They simply gambled on the

success of the project. The reason they took the gamble is apparent. The Taylors knew that the valuation at $135,000.00 was ridiculously low and that a tremendous profit was in prospect. Taylor inspected the timber on August 4 and at first agreed to let Brenner and Marsh have 50% of the profits (Taylor testimony, R. 892). But three days later he refused to go through with this arrangement, offered and finally gave them an option at $300,000.00, refusing an option at $260,000.00, and Taylor in his pretrial deposition, justifying his $300,000.00 demand, admitted he thought the property was worth that figure (R. 894). The Taylors are thus exposed as parties who, motivated by avarice, gambled on a transaction they knew to be illegal and lost, and there is no possible justification for any conclusion that they be made whole at the Government's expense.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment be reversed, insofar as it required the Government to sell this property and pay over any part of the proceeds to the Taylors.

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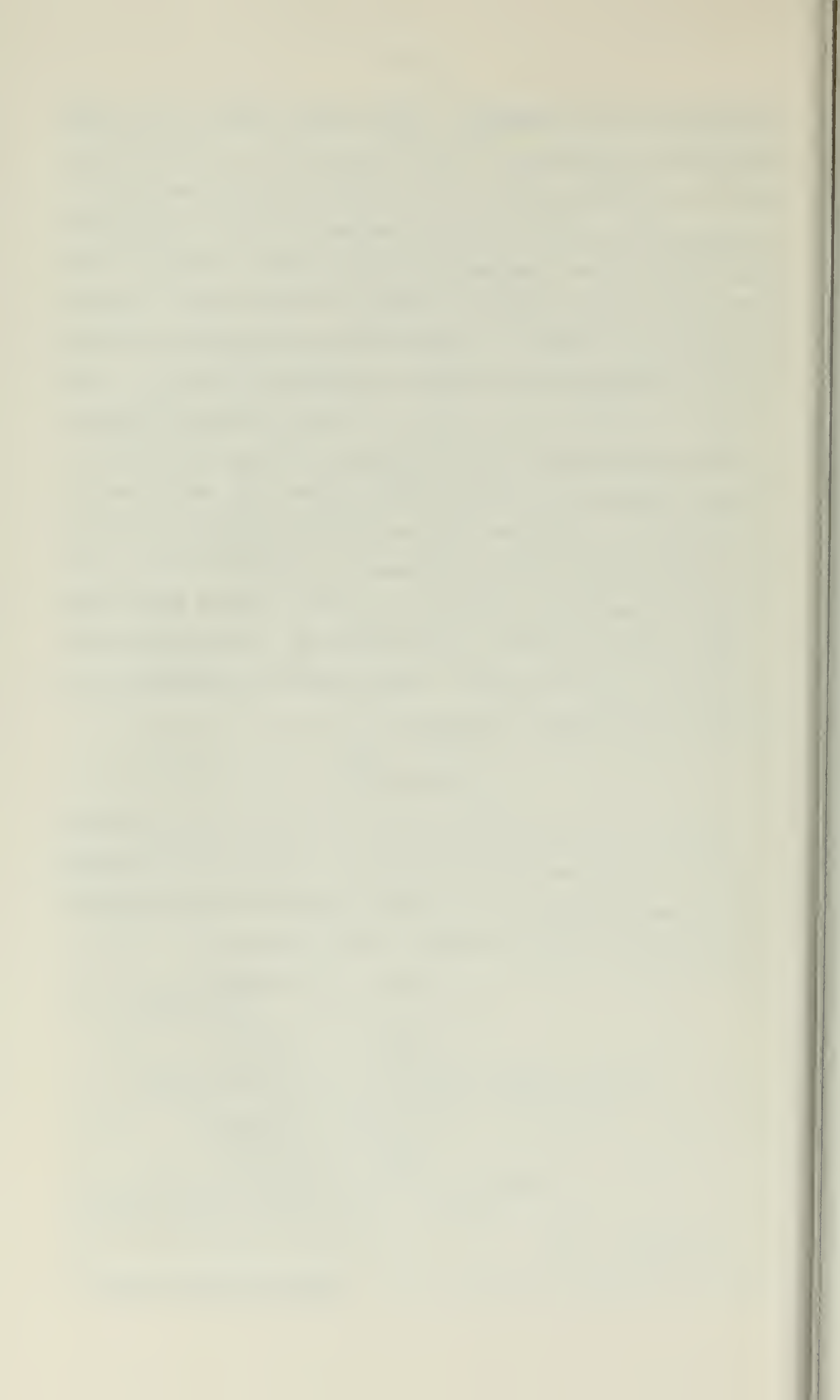
August 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953



No. 13,681

In the

United States Court of Appeals

For the Ninth Circuit

Ernestine C. Siniscal and Elmer A. Reed, *Appellants*,

vs.

United States of America, as Trustee and Guardian and ex rel. of the Estates and Persons of Jasper Grant and Harold F. Thornton; Henry B. Taylor and Elizabeth A. Taylor, husband and wife; William F. Brenner and Fred M. Marsh, *Appellees.*

United States of America, as Trustee and Guardian and ex rel. of the Estates and Persons of Jasper Grant and Harold F. Thornton, *Appellant*,

vs.

Ernestine C. Siniscal, Elmer A. Reed, Henry B. Taylor and Elizabeth A. Taylor, husband and wife, and S. D. Alexander, *Appellees.*

Appellants' Petition for Rehearing

On Appeal from the United States District Court for the District of Oregon.

Honorable Gus J. Solomon, *District Judge*

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FILED

DEC

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No. 13,681

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Appellants' Petition for Rehearing

On Appeal from the United States District Court for the District of Oregon.

Honorable Gus J. Solomon, *District Judge*.

PETITION FOR REHEARING

The appellants herewith present their petition for a rehearing with the request that the Court sit and hear it, in banc.

That the court erred in its opinion in the following respects:

I.

Did the trial court have jurisdiction over these applicants, Reed and Siniscal, when both appellants were enrolled Indians and living on a reservation, and as such, the relation of guardian and ward existed between them and the U. S. A., while the U. S. District Attorney appears for the guardian, ward and as trustee of the two Indian plaintiffs, who are allottees of inherited interests, and who filed a cross appeal.

How then can a valid process be served in this suit upon these incompetent appellants alone, and further, when at the same time their guardian, U. S. A. has an adverse interest? That is the question to be answered.

This court in its opinion recites "We think 25 U. S. C. Sec. 175 is not mandatory, and that its purpose is no more than to insure the Indians adequate representation in suits to which they might be parties" and conclude "were ably represented by counsels, and that is sufficient". We submit that this rule has no application to this situation.

Appellants are incompetent Indians, and any process served personally upon them alone was of no force and effect without a service of summons upon a guardian ad litem. Appellants have maintained this position since the filing of this suit in the lower court.

The court cites *Rule 61 Fed. Rules of Procedure.* However, we submit after a careful reading of it that it does not apply to a suit of this nature and character. We are dealing here with a jurisdictional question, in that, the service of process upon an incompetent alone never confers jurisdiction upon the court. The U. S. A. has declared these appellants incompetents and wards of the government, and we submit that no court can secure jurisdiction over these Indian wards without due process of law. The government recognizes the law of the state in the service of process.

It is well settled in all jurisdictions that all proceedings had subsequent to an unlawful service of process are absolutely void. If the service of process is defective, no acts, conduct, or rule can make it otherwise.

It is for the government and not the Courts to determine when the relation of guardian and ward ceases; it is factual and not judicial.

In *Winton vs. Amos et al.*, 65 L. Ed. 684 (pg. 688, Col. 1, & pg. 695 Col. 1,) where incompetent Indians were defendants, the government appointed the governor guardian ad litem to serve process on, and the Attorney General to represent the guardian ad litem, and the Supreme Court held that to be sufficient.

In *Rule 17 (c), Title 28 F. R. C. P.* recites that the Court shall appoint a guardian ad litem for an incompe-

tent person, not otherwise represented in an action, or shall make such other order, as it deems proper for protection of an incompetent person. No such order was ever made for these incompetents, and they were treated as though they were competents, while their guardian was acting adversely to them.

In *Zaro vs. Straus et al.*, 167 Fed. Rep. 2nd 218, where an Indian woman was incompetent and had a former guardian in Ohio, and service of summons was made upon her personally in Florida, where she then resided, and an attorney thereupon represented her in court, but the court held that the service of process was insufficient to give the court jurisdiction, and in as much as she was incompetent, a guardian ad litem should have been appointed for defendant by the court, and service of the summons be made upon the guardian ad litem, in order to obtain jurisdiction over the incompetent, as provided by the laws of the State of Florida.

In the State of Oregon, where these incompetents are residents, the statute provides for personal service of summons upon both the guardian ad litem and his ward, in order to obtain jurisdiction, Sec. 1-605 O. C. L. A., which has been the law in that state for many years past. The U. S. Rule requires that service of the summons shall be made according to the Statute of the state wherein the incompetent resides, which was not pur-

sued in this suit here, and the District Court never acquired jurisdiction over these incompetents and the subject matter.

In *Sandoval vs. Rosser*, 26 S. W. 950 (see p. 954) holds that a general guardian cannot appear for minors in a suit where he is adversely interested, and a guardian ad litem should have been appointed for the incompetents in order to obtain jurisdiction.

Also *Kidd vs. Prince*, 182 S. W. pgs. 725-729-731 (Tex.) holds that notwithstanding there was no statute or law on the subject forbidding or permitting it, and it is therefore void, unless a guardian ad litem is appointed for the incompetents whose interests are not adverse, even though the process was regularly served upon the incompetents. This also applies to parents as natural guardians.

In our extensive search we have not found a single decision which supports the rule laid down by this court that an incompetent is not entitled to a guardian ad litem in a court proceeding, and especially where their guardian held adverse interests to the incompetents.

II.

ESCROW

After the sale of the Indian land was completed, the Taylors and appellants went to the office of Mr. Hen-

derson, where the escrow was executed.. However, the fact is that the Taylors by their attorneys had theretofore investigated the title to this land and were advised by the title company that it would not issue a title policy until a fee patent had been issued, and the Taylors knowing this fact provided in the escrow agreement, Ex. 2 A, for the escrow holder to pay this money to Ernestine C. Siniscal upon receipt from their attorneys that they have rendered an opinion that a merchantable title is vested in the Taylors of this land.

The escrow to terminate at 6:00 o'clock P. M. August 14, 1951 unless you receive also from the Taylors' attorneys an objection to the title of said real estate, which is to be corrected. The escrow bank never had control over this escrow, as it remained under the complete control of the Taylors' attorneys, and therefore it is void.

We submit that this escrow was executed in fraud and deceit by the Taylors with the sole object, intent and purpose to and did defraud the appellants out of their money justly due them.

Furthermore, the escrow was limited from August 7th to Aug. 14th, 1951. The appellants did not become aware of the fact at that time that the Taylors had previously examined the title, until at the time of the trial.

The payment was to be made to Siniscal for her services, and she was told at the time, pages 778-788 Tr. of Record, all she had to do was to sign the papers at the Indian Bureau. She knew nothing about the procedure. Siniscal had nothing to do with the title except convey the land to the Taylors.

The escrow agreement is also void as to these appellants for the reason that it was willfully conceived by the Taylors with the object and intent to deceive and defraud her out of this money. The Taylors definitely knew and were fully aware at the time that a fee patent was required to this land, before it could be conveyed to them, and that the title company would not issue a title policy until a fee patent was issued. Furthermore, on August 24, 1951 the Taylors had Siniscal sign an application for a fee patent, and this court held that it approved the trial judges finding that no patent was ever issued; see pgs. 195-196, 296-297, Ex. 26 pg. 348, 351, 352, 591, 592, 593, Tr.

It will be observed that Ex. 70 and Ex. 71 are dated May 1952, and the sale was had August 7, 1951; see page 608-609, 668 and 675 Tr. Where are the rest of these telegrams and letters Mr. Henderson refers to? We were unable to obtain any information in that respect.

The U. S. attorney in its brief stated that the tran-

script did not mention anything about a patent having been issued. What about Mr. Henderson's direct statement in the Tr. pg. 609 that a patent had issued and would be forwarded in 3 weeks to the land office, which was not disputed. The court does not specifically point out that the escrow is invalid, unless it could be possibly inferred in the general statement "that the judgment is affirmed in so far as it voids all transactions relating to the transfer of the land."

We again call the Courts attention to our brief Pg. 27 as to the law and facts in the escrow agreement.

We believe that in view of the law and facts in this case, we are entitled to a rehearing in this case.

We seriously question the right of Siniscal as an incompetent to enter into the escrow agreement, without a guardian's consent and an order of court.

The incompetent could recover the money by an action at law for services rendered by the appointment of a guardian ad litem.

The appellants' attorneys waive oral argument on the appellants' petition for rehearing.

Respectfully Submitted,

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